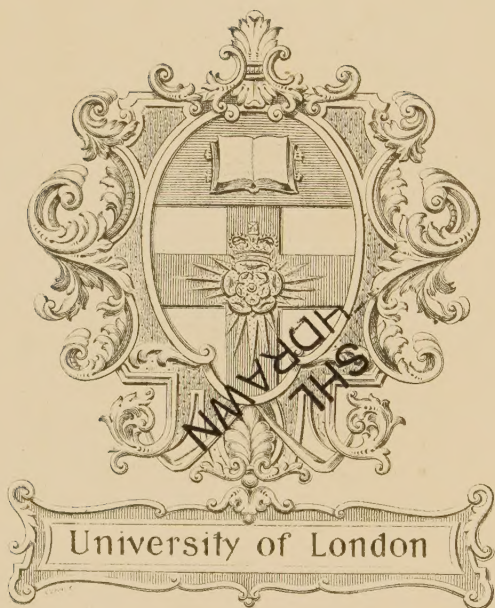






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ERRATUM

Page 60, line 11, should read :—

‘ any attempt at extradition which does not fall within the scope of a treaty ’

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INTERNATIONAL LAW AND THE PROPERTY OF ALIENS

By Sir JOHN FISCHER WILLIAMS, C.B.E., K.C.

AN apology is owing to the readers of the British Year Book for a return to a subject which, under the title of "Expropriation and International Law", was dealt with in the Year Book for 1925 very fully by Mr. Fachiri. But since that date the question what is the true rule of international law as to the right of a state to deal with the property of aliens lying within its jurisdiction has been the occasion of no little discussion among lawyers and has been brought to the attention of statesmen both by the dispute between Hungary and Rumania as to the expropriation of rural land-owners in Transylvania and by the discussions between Mexico and the United States as to American interests in Mexico. It is not the intention of this article to deal with the facts or the law of these specific cases; it is enough to remark that in the Rumano-Hungarian conflict the main issue is that of the interpretation of the Treaty of Trianon and that a decision on legal grounds in favour of the Hungarian thesis does not necessarily involve a pronouncement on a general question of international law, though the same proposition would not be true of a legal decision in favour of Rumania.

The general question of international law which it is proposed to consider is, whether or not, apart from any special terms imposed by a "concession" or by treaty, there exists a general rule that if a state expropriates the property of an alien without the payment of full¹ compensation it commits a wrong of which the state of the alien affected is entitled to complain, even if the measure of expropriation applies indiscriminately to nationals and to aliens. The affirmative of this proposition is asserted by many lawyers of great eminence,² and appears at the present time to be supported by the predominant sentiment of the jurists of the United States.³ But when we pass from the domain of opinion

¹ The adjective used sometimes is "adequate"—but there seems to be little or no difference of meaning.

² Their views have been published by the Hungarian Government in connexion with the dispute with Rumania.

³ See the interesting discussion of the whole question under the title "Problems of International Law in Mexican Constitution" by Mr. John P. Bullington in the *American Journal of International Law*, Vol. XXI, p. 685 and following (October 1927).

On the other side reference may be made to an article by M. Alvarez in the *Europe*

to the realm of actual international law the doctrine is found to have less support. For his own part the present writer does not believe that it is an accepted doctrine of international society : there appear to him to be good reasons why it ought not to be received into the body of international law.

Let us then consider first the action of states in their international relations and the decisions of tribunals of an international character—which for an English lawyer is much the same thing as looking at the matter as a question of authority—and next, if authority be found not to be conclusive, let us look at it as a question of principle, as a question, that is, of the guiding general rules, which, whatever their source, are recognized as binding on international society.

I. AUTHORITIES.

Under the head of authority fall to be noticed first the cases discussed by Mr. Fachiri,¹ the projected Sicilian Sulphur Monopoly, against which Lord Palmerston protested energetically and effectively, the case of Mr. Jonas King, in which the United States intervened with the Greek Government in favour of an American citizen, the Delagoa Railway case, the case of the Portuguese Religious Properties and the case of the Italian Life Insurance Monopoly.

It would be tedious and unnecessary to repeat Mr. Fachiri's examination of these cases. It is enough to say that none of them constitutes a satisfactory authority for a general proposition of international law. In the Sicilian case the British claim was based on a treaty provision and was never submitted to any judicial or arbitral decision.² The case of Mr. Jonas King³ (which

Nouvelle of October 29, 1927, in which that distinguished jurist reaches the same conclusions, though not by the same lines of reasoning, as those now presented to the reader.

¹ *British Year Book of International Law* for 1925, p. 159.

² Lord Palmerston's dispatch in the Sicilian case, if it is to be relied on as an authority for the rule that in any expropriation full compensation must be paid to foreigners, whatever is done as to nationals, should be read with his dispatch of February 20, 1840, addressed to China (*China and Foreign Powers*, Sir F. Whyte, K.C.S.I., Oxford University Press, 1927) : "The Queen of England desires that her subjects who may go into foreign countries should obey the laws of those countries. . . . If a Government makes a law which applies both to its own subjects and to foreigners, such Government ought to enforce that law impartially or not at all." No doubt this dispatch was written *alio intuitu*, but it may serve to show how normally and naturally in these questions a government claims that another government should give to aliens the same treatment as to nationals and not a treatment of special favour.

³ Moore's *Digest*, Vol. VI, pp. 262-4. There was a similar claim made by the British Government against the Greek Government in the case of Mr. Finlay, some of whose land was taken for King Otho's garden (Bullington, *op. cit.*, p. 696).

figures in Moore's *Digest* under the rubric "Denial of Justice"), put at the highest—and the facts are not absolutely clear—did not raise the issue of the international validity of confiscatory legislation applied to an alien equally with nationals and was not settled by arbitral or judicial decision. In the Delagoa Bay case the main issue was the legitimacy or otherwise of the cancellation of a railway concession. The case of the Portuguese Religious Properties came nearer to raising the issue which we are now discussing, but it does not appear that the case was intended to be argued on the footing that the action taken applied equally to foreigners and nationals, and in any event the matter was compromised.

The case of the Italian Insurance Monopoly is more important. In that case the Italian Government had introduced legislation creating a monopoly of life insurance with no compensation to existing insurance companies doing business in Italy, many of which were foreign. The Austro-Hungarian, British, French, German, and United States Governments all protested, and M. Edouard Clunet delivered a forcible opinion¹ to the effect that the foreign companies were entitled to compensation: with this opinion M. Anzilotti, and MM. T. C. M. Asser, von Bar, T. E. Holland, Gabba, Lammasch, Lyon-Caen, Roguin, and Albéric Rollin, expressed their agreement. These are very weighty authorities. The Bill, however, became law in 1912, the only concession made being that the existing insurance companies, Italian and foreign, were allowed ten years, a longer period than that originally proposed, for winding up their business.²

The case thus revealed a sharp conflict of opinion between many eminent lawyers and the Government of a great Power on a matter of international law. On positivist theories of law the dissent of a great Power would certainly shake the authority of a doctrine which is in process of establishment; ³ inapplicable to

¹ The "conclusions" of this opinion (but unfortunately not the reasoning on which those conclusions were based) were published in the *Bulletin des Assurances* for 1912, 3rd Part, and may also be found in the documents published by the Hungarian Government in the matter of the Rumano-Hungarian dispute over the Transylvania expropriations—*Budapest*, 1924, p. 152.

² In fact that part of the law of 1912 which gave the Italian State a monopoly of life insurance has never taken effect, as it was found that the State Insurance Office got quite enough business in competition with the Companies without any legal monopoly. But there never was any official action for treating the foreign companies differently from the Italian.

³ This is not to say that a Power to which a doctrine has once become applicable by acceptance express or implied, or (if that be possible) otherwise, can invalidate the doctrine by withdrawing its own support.

the Power that rejects it, the doctrine would need the express affirmative support of other Powers if it is to be law for them. And even if we are not adherents of the extreme positivist position, and are prepared to admit that doctrines justified by "the reason of the thing"¹ form part of international law, without any express assent, still the fact that a highly civilized country has its own views as to "the reason of the thing" must give pause to the confidence with which a doctrine is claimed as self-evident.² Law, after all, whether international or municipal, needs for its establishment something more than the declarations of the learned, and if it is claimed for a principle that it so manifestly embodies natural justice or the "reason of the thing" as to be at once of its own force a part of law, such a principle must show that it has been approved, if not *semper, ubique, ab omnibus*, at any rate by the great majority of sensible men, whenever it has emerged for consideration, within the limits of modern—and perhaps of classical—civilization.

The Italian case had an almost contemporary parallel in South America. In 1911 a proposal for a state monopoly of insurance was brought forward in Uruguay and appears to have been actually voted by the Congress of that state: the British Government protested and the measure was not carried into effect.³ The British objections were based on the general grounds that the measure involved the expropriation without compensation of the British companies established in Uruguay for the transaction of insurance business; that British Insurance companies had spent large sums in creating and extending their business subject to the regulations imposed by Uruguayan law; that it was only by continuing to carry on this business that they could expect to recoup themselves for their large expenditure in the past; that under the proposed law all the valuable assets of the companies, comprised in the term "goodwill", were to be annihilated; and that the measure proposed by the Uruguayan Government was consequently of a confiscatory character.

But the issue was not raised whether a measure of confiscation

¹ See on this subject Dr. Lauterpacht's monograph on *Private Law Sources and Analogies of International Law*; London, Longmans, 1927.

² Mr. Fachiri seems inclined to explain away this case as not involving the confiscation of "specific" (= tangible) property. But the business, the "goodwill", of the companies was destroyed and their profits in effect were to be transferred to the state. M. Clunet seems to have been strictly accurate when he said that the law would impose on the foreign companies "*un sort qui aboutirait à une véritable confiscation*".

³ See *Revue de droit international*, 2nd Series, Vol. XIV, p. 86.

applicable equally to nationals and aliens is open to objection, and the general tone of the British remonstrance is more akin to that of a diplomatic remonstrance against a measure—e.g. an increase of customs duties—which, though clearly within domestic jurisdiction, nevertheless has a harmful effect on the interest of a foreign country.

There are one or two other cases which have been referred to as throwing some light on our problem.

There are, for instance, the private claims, which France was compelled to recognize in 1814, for compensation for losses suffered by British subjects as a result of Revolutionary or Napoleonic legislation. British subjects, holders of French *rentes*, were to be compensated for the loss they had suffered in the reduction by 66 per cent. of their holdings to the *tiers consolidé*, and the Duke of Richmond was to have restored to him the estate of Aubigny which had been confiscated.¹ Such incidents, however, merely illustrate the terms to which a state defeated in war may be asked to submit. They find their analogies in the articles ² of the treaties at the end of the Great War by which the Central Powers were compelled to make compensation or restitution to Allied nationals who had suffered by their war legislation. Indeed, the original French action in these cases has perhaps as much value as a precedent—and that is very little—as the later British reaction.

Again, and perhaps with less justification, references are made to cases in which a state has attempted to repudiate or not to recognize a separate debt, not forming part of a public loan, but arising under a particular contract. Such were the Canevaro case (Italy and Peru) decided at the Permanent Court of Arbitration of The Hague in 1912,³ and the case of France (Dreyfus Brothers and other French claimants) against Peru,⁴ decided a few years later at the same Court. Obviously in such cases the general principle which we are discussing is not involved.⁵

¹ See the Convention between Great Britain and France relative to the claims of British subjects, signed at Paris, November 20, 1815. (Hertslet's *Map of Europe by Treaty*, Vol. I, p. 399).

These cases are mentioned summarily in the *Cambridge History of British Foreign Policy*, Vol. I, p. 513.

The case of the Duke of Richmond is cited at p. 7 of an opinion of M. Pillet, given in the Hungaro-Rumanian affair in November, 1926, and published by the Hungarian Government.

² Articles 297 of the Treaty of Versailles, 249 of the Austrian, and 232 of the Hungarian Treaty. ³ *American Journal of International Law*, Vol. VI, p. 746.

⁴ *American Journal of International Law*, Vol. XVI, p. 483.

⁵ A case sometimes referred to is that of a claim made by the United States against

All these authorities must be admitted to be inconclusive or at any rate insufficient for the establishment of the general proposition of international law ; and the onus is on those who affirm it.

Indeed, the very name of " authority " when applied simply to the arguments used by one party to an international dispute is a misnomer. Such arguments, at any rate while the dispute is being treated diplomatically and not legally, furnish at the best evidence of legal views which one Power is at one particular time and for a definite purpose prepared to support. A Power is evidently not at liberty, if it wishes to maintain the respect of other nations, to change without plausible reason its attitude on questions of international law, and the arguments used on one occasion may, therefore, validly be brought up against it in another conflict, if the point at issue has not in the meantime been settled by general consent. But an argument cannot by itself make law. There is an ascending scale in these matters ; in the lowest class is the diplomatic argument, next comes the legal argument, last and most authoritative—though with varying degrees of authority—come legal or arbitral decisions pronounced after argument.

And this brings us to what has been put forward as a decision possessing all the authority which any legal decision can have in international affairs—the decision given last year by the Permanent Court of International Justice in the litigation between Germany and Poland as to the expropriation of the Chorzow Factory and certain rural estates in Polish Upper Silesia. It is contended that this decision stamped the general proposition which we are discussing with the seal of the approval of the Permanent Court.¹ Close attention must, therefore, be given to the case.

Salvador. A summary account of this case is given by MM. de Lapradelle and Politis in the note to p. XII of the second volume of their *Recueil des Arbitrages Internationaux* (based on Moore's *Digest of International Arbitrations*, Vol. II, 1855–1857). An American citizen, Henry Savage, had imported in September, 1851, gunpowder into Salvador. Six months later the Government of that state issued a decree making gunpowder a Government monopoly and ordering any powder then owned by private individuals to be stored under certain conditions. Savage found his powder under these conditions unsaleable, and after some fruitless negotiations the Government purported to confiscate it.

The American Government took up the case of Savage, alleging that the action of Salvador was a violation of a treaty of January, 1850. The case went to arbitration and was decided in favour of the United States. But as neither the " compromis " nor the award has been published, the case is not thought worthy of a full report by MM. de Lapradelle and Politis and can hardly be considered as an authority for any general proposition of international law.

¹ See the very powerfully reasoned article by M. Gidel on Decision No. 7 of the

The points at issue, put shortly, were (1) whether certain Polish legislation did or did not amount to "liquidation" within the meaning of a convention concluded at Geneva between Germany and Poland so as to involve the application of certain articles of the Treaty of Versailles by which Polish measures for the liquidation of German property were regulated, (2) whether the Polish legislation was illicit if and in so far as the Geneva Convention did not authorize liquidation, (3) whether the attitude of the Polish Government as to two German companies and the liquidation of certain rural estates owned by Germans were or were not in conformity with the same Convention.

The Court decided that the Polish legislation was contrary to the Geneva Convention, that the attitude of the Polish Government to the two companies concerned was not in conformity with that Convention, and that as to some of the rural estates the notices to liquidate given by the Polish Government were not in conformity with that Convention, while, as to certain other rural estates, the Court saw no reason to find fault with, or had not sufficient evidence to justify it in finding fault with, the action of that Government as being contrary to the Convention. Clearly the decision as such deals with the construction to be put on the German-Polish Geneva Convention, having regard to the circumstances in which it was executed and to certain provisions of the Treaty of Versailles, and with nothing else whatever. The arguments no doubt ranged wide, and there is one passage of the judgment which taken apart from its context has been cited as an authority for the affirmation of the general proposition as to alien property which we are discussing. This is the passage which runs:¹

"Further, there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed. Any measure affecting the property, rights and interests of German subjects covered by Head III of the Convention, which is not justified on special grounds, taking precedence over the Convention, and which oversteps the limits set by the generally accepted principles of international law, is therefore incompatible with the régime established under the Convention. The legal designation applied by one or other of the interested Parties to the act in dispute is irrelevant if the measure in fact affects German nationals in a manner contrary to the principles enunciated above.

Permanent Court of International Justice in the *Revue Générale de Droit International Public*, January and February, 1927. Published as a separate pamphlet—A. Pedone, Paris.

¹ Publications of the Permanent Court of International Justice, Series A, Decision No. 7. Sijthoff, The Hague.

“ It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners ; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention.”

Now it is hardly in dispute that the object of the Geneva Convention was to allow a certain limited class of expropriations of German property and to prohibit all others : article 6 of that instrument in fact ran :

“ Poland may expropriate in Polish Upper Silesia in conformity with the provisions of articles 7 to 23 undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia.”

and any suggestion that there existed a general right of expropriation applicable in defiance of the Convention made nonsense of the whole instrument. The most that could be plausibly suggested was that there might be special expropriations made for purposes of public utility with which the Convention was not intended to interfere, and it was this aspect of the case with which the Court dealt in the passage quoted. To deduce from that passage an affirmation by the Court having the force of a judicial precedent that there exists a canon of international law forbidding at all times and in all places the expropriation of aliens by a measure of general legislation applying also to nationals, is surely to misread the judgment. No such point is embodied in, or was necessary to, the decision. The Court indeed itself in a later case ¹ summed up its judgment in case No. 7 as follows :

“ In Judgment No. 7 it held that, as the expropriation allowed under Head III of the Geneva Convention is a derogation from the rules generally applied as regards the treatment of foreigners and from the principle of respect for vested rights, and this derogation is itself of a strictly exceptional character, any other measure affecting the property, rights and interests of German nationals contemplated in Head III and not supported by some special authority having precedence over the Convention, and which oversteps the limits of generally accepted international law, is incompatible with the régime established by the Convention. The seizure of the property, rights and interests belonging to the Oberschlesische and Bayerische was precisely a measure of this kind. It is in this sense that the measures taken by the Polish Government in respect of the above-mentioned Companies are, in the Court's opinion, contrary to Head III of the Geneva Convention, and this in spite of the fact that they do not, properly speaking, fall within the expropriations or liquidations regulated under that Head.”

¹ Judgment No. 9. Permanent Court, Series A, p. 27.

It is obvious from this summary that the question whether when a state passes a general law of expropriation it is compelled to grant special treatment for foreigners, was not decided in this case. That there is a general expectation that a foreigner, like a national, will not be deprived of his property without compensation or that a law of expropriation without compensation aimed against foreigners only is an international offence, we are not concerned to deny.

We may even go further and say that even if it had been possible to treat what the judgment says, as the expression of a considered opinion of general application, an attempt to use the judgment as an authority for the wider proposition, is based on a misconception of the nature and limits of the argument from the authority of the decided case, at any rate according to the views generally received in this country, and, it is believed, in the United States.

Even in those legal systems which recognize the imperative authority of precedents—as the Permanent Court does not, inasmuch as according to its Statute (Article 59) one case has no binding force for the decision of another—the binding character of a decision is limited to cases in which the material facts are similar in character to those on which the decision was given. A court has no power to enact binding rules of law ; all it can do is to decide a particular case, and if in the decision of a particular case it bases itself upon a rule, that rule must be applied whenever the facts of another case are similar, but not otherwise. Expressions of opinion by a court are entitled to the respect due to the knowledge and authority of its members, but they remain opinions ; they are not binding precedents. In a system such as that of the Permanent Court, where decisions have not a binding authority as precedents, this distinction between dictum and decision, familiar enough to English and American lawyers, needs specially to be borne in mind. Otherwise we should have the curious anomaly that whereas the decision, which is the effective utterance of the Court, had no legally binding authority for other cases, the dictum, which produces no effect on the rights of the parties, is to be of authority for the future. And indeed, it cannot be denied that even in a system such as that of the Permanent Court where precedents are not authoritative, the same Court will always have a very strong tendency to follow its own decisions. For if it fails to do so, it will both admit error—which no human being in a seat of authority, or out of it, likes to do—and will sin against that

elementary rule of natural justice which requires that two persons whose legal position is the same should receive the same treatment—a requirement which indeed is implied in a mere assertion that a Court applies law, that is to say, rules. And thus, even in the system of the Permanent Court, the right use of precedents is a matter of practical importance. No doubt as and when authorities in international law become more numerous, the temptation to resort to dicta as if they were authoritative will become less strong.

This, however, is a digression. Let it be enough to say that Judgment No. 7 of the Permanent Court is not an authority in favour of the existence of the general rule which we are discussing.¹

And the same observation applies to the dicta of two other tribunals—dicta the value of which consists only in the fact that they are evidence that the jurists who decided those cases were not prepared to accept the general proposition which we are now discussing.

Thus, in the arbitration between the Reparation Commission and the Government of the United States, the decision in which was reported in last year's Year Book, the majority of the arbitrators preface their award by the following (amongst other) recitals :

“Whereas, in application of a generally accepted principle, any person taking up residence or investing capital in a foreign country must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all the laws of that country;

“Whereas therefore an Allied or Associated national having invested capital in Germany has no ground for complaint if for this reason he incurs the same treatment as German nationals ;

“Whereas this principle of equality of treatment, and not of discrimination in favour of Allied and Associated nationals, has moreover been consecrated by the Treaty of Versailles in articles 276 (c) and (d) and 298,² dealing with the

¹ Closely analogous to the dicta in the Upper Silesian case is the dictum of the Umpire in the American-Norwegian case at the Hague Court of Arbitration in 1922 (*American Journal of International Law*, Vol. XVII, p. 392) : “No state can exercise towards the citizens of another civilized state the ‘power of eminent domain’ without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary.” But this was a case in which the question at issue was one of amount, the United States having recognized its liability to make just compensation for the value of the property taken. The question of the right of a state to legislate on equal terms for aliens and nationals in respect of expropriation was never raised.

² Article 276 of the Treaty of Versailles :

“Germany undertakes :

“(c) not to subject the nationals of the Allied and Associated Powers, their property rights or interests, including companies and associations in which they are interested,

treatment to be accorded in Germany to the property and interests of the said nationals after January 10, 1920 ;

"Whereas this same principle seems also to have been followed by the Reparation Commission in the case of laws for the execution of the Dawes Plan ;

"Whereas in fact several metallurgic and mining companies, indisputably German, but of which most or all the shareholders were Allied nationals, having protested to the Reparation Commission against the submission of their concerns to the mortgage charge represented by the industrial debentures of the Dawes Plan, the Commission merely transmitted their claims to the Trustee for these Debentures, together with the unanimous opinion of its Legal Service (Opinion No. 527 of November 27, 1924) ;

"Whereas this opinion rejected the claims because all foreign nationals, including Allied and Associated nationals, residing in Germany or possessing property there, must be considered to be subject, on the same footing as German nationals, to the payment of the charges provided for by the laws carrying out the Dawes Plan ;

"Whereas, in fine, at the time of the confiscation of the tankers of the D.A.P.G., the German Government committed no act of discrimination against this company as compared with other German shipping companies."

Similarly in the *Cadenhead* case,¹ a claim before the American and British Pecuniary Claims Arbitration Tribunal in respect of the accidental killing of a British subject by an American sentinel, the Arbitral Tribunal remarked that :

"It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and *has no greater rights than a national of that country.*"

Probably further search would reveal many other such dicta.

In this list of authorities, a reference should be made to a
to any charge, tax or impost, direct or indirect, other or higher than those which are
or may be imposed on her own nationals or their property, rights or interests ;

"(d) Not to subject the nationals of any one of the Allied and Associated Powers to any restriction which was not applicable on July 1, 1914, to the nationals of such Powers, unless such restriction is likewise imposed on her own nationals."

Article 298.

"Germany undertakes :

"(b) not to subject the property, rights or interests of the nationals of the Allied or Associated Powers to any measures in derogation of property rights which are not applied equally to the property, rights and interests of German nationals, and to pay adequate compensation in the event of the application of these measures."

¹ *American Journal*, Vol. VIII, p. 663 (1914).

The American Commissioner (Mr. F. K. Nielsen) in the case of *Garcia v. U.S.A.* (Mixed Claims Commission U.S.A. v. Mexico, No. 292) reported in the *American Journal of International Law*, Vol. XXI, p. 593, comments that "the last clause of the last paragraph may not be very happily worded, but I do not think that the learned tribunal meant to give expression to the view that domestic laws cannot contravene international law". The italics in the text above are not in the original.

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recent case before the German Supreme Court¹ in which foreign holders of German pre-war loans resident abroad claimed payment of interest in reichsmarks instead of paper marks, one of the reasons alleged being that the German devalorisation law was contrary to international law in so far as it affected foreign property because it involved confiscation without full compensation. The Court rejected the claim on the ground that the German law from time to time applicable to the bonds was part of the bondholder's contract and declined to inquire whether any general rule of international law to the effect alleged by the claimants was to be recognized. It can hardly be doubted that this decision will meet with the approval of lawyers in every country; but it must be remarked that while it leaves the general question in form untouched it shows that a state is in a position to take action which in its practical and commercial effects is equivalent to a destruction without compensation of property owned by foreigners when a similar measure applies to nationals.

The discussion of "authorities" must not, however, be confined to arbitral and judicial decisions. It has been suggested² that the rules as to private property recognized in The Hague Conventions of 1907 and the rule that private property is not affected by cession of territory, "taken with the fact that the institution of private property is still one of the principal bases of the social institutions of the Western World", "necessarily involve the existence of a rule of positive international law protecting the private property of individual aliens in time of peace". The present writer finds this argument difficult to follow. The Hague Convention as to the Laws and Customs of War on Land (articles 42 to 56) in dealing with "Military Authority over the Territory of the Hostile State" imposes limits on the powers of the Military High Command, enjoining upon it, amongst many other things, that "private property cannot be confiscated". To infer from this rule of war, and from the rule that cession does not affect private titles, a general obligation to treat aliens more favourably than nationals in legislation as to property, is manifestly to take a step which is not warranted by logic. Nor can the gap be filled by an appeal to the general respect felt in the Western World for the institution of private property. The present writer fully sympathizes with and shares that respect. But this respect may be overridden by municipal legislation. And if this respect—which is said

¹ *Giulini v. The Reich*. Reichsgericht IV. 359/26, January 27, 1927.

² See Mr. Bullington's article, already referred to, at pp. 694-5.

(perhaps this is an understatement) to be limited to the Western World ; if so, has it now universal validity as a basis of international law ?—is not in itself a sufficient foundation for a proposition of international law, does it become so by combination with propositions limited to peculiar and very special sets of circumstances ?

Next, let us look at the report on the subject of the responsibility of Governments adopted by the Committee of Jurists which is now engaged under the auspices of the League of Nations in examining what branches of international law may be considered suitable for codification ; the report seems to adopt the view that “ national treatment ” is all that an alien can demand for his property.

Thus, the report says : ¹

*“ Treatment.—*Here also the will of the community of peoples is clearly defined. It accepts the above-mentioned rights as being the minimum which a state should accord to foreigners in its territory, but it does not thereby recognize the right to claim for the foreigner more favourable treatment than is accorded to nationals. The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that a state is obliged to accord such treatment to foreigners unless that obligation has been embodied in a treaty. We thereby infer that a state goes beyond the dictates of its duty when it offers foreigners a treatment similar to that accorded to its nationals. In any case, a state owes nothing more than that to foreigners, and any pretension to the contrary would be inadmissible and unjust both morally and juridically.”

On this reasoning “ national treatment ” is the utmost that foreigners can claim, and presumably the passages as to confiscation ² in other parts of the report must be read as referring to measures applied to foreigners alone and not to nationals.

But the “ conclusions ” of the report—which are stated to

¹ *American Journal*, Vol. XX, Supplement, p. 182.

² *Ibid.*, pp. 183 and 197 :

Page 183.—“ It (a violation of an international rule) is positive when the state commits an unlawful act, contrary to international law ; if, for instance, by a national law, it declares property owned by foreigners in its territory to be state property, without granting any compensation.”

Page 197.—“ In short, if international law is to be codified—as it certainly should be—in accordance with the will of states, as manifested either by treaties or by international practice, we must conclude that the state is not responsible for loss suffered by foreigners in cases of riot or revolution.

“ We do not, however, include in this category loss of property sustained by foreigners through the action of the state as a result of requisition, expropriation, confiscation, spoliation or on any other arbitrary proceedings. Whether in peace, in war or in time of revolution, the state should be foremost in respecting and protecting the property of foreigners.”

contain amendments made by M. Guerrero as a result of the discussion in the Committee of Experts, leave the matter still in doubt; these conclusions say :¹

“ A state is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the state was bound under international law to perform and inflicted by an official within the limits of his competence, subject always to the following conditions :

(a) If the right which has been infringed and which is recognized as belonging to the state of which the injured foreigner is a national is a positive right established by a treaty between the two states or by the customary law ;

(b) If the injury suffered does not arise from an act performed by the official for the defence of the rights of the state, except in the case of the existence of contrary treaty stipulations.

The state on whose behalf the official has acted cannot escape responsibility by pleading the inadequacy of its law.”

But is expropriation for inadequate or no compensation applied by law equally to foreigners and nationals “ an act contrary to international law ” ? Is the right to full compensation “ a positive right established by the customary law ” ? The conclusions do not give a categorical answer.

It is significant that this report was the work of a South American and a Chinese jurist—MM. Guerrero and Wang Chung Hui, both nationals of countries where foreign-owned property is an important element in the economic system.

Lastly, before we leave the discussion of the utterances of non-judicial authorities, let us call attention to the very careful language of the resolution (*vœu*), adopted by the Institute of International Law at its meeting at Lausanne on August 31, 1927, on the subject of damage caused on the territory of a state in time of peace to the persons or property of foreigners.

The first article of that resolution declared that “ a state is responsible for damage caused to foreigners by any act or omission which is contrary to its international obligations, whatever be the state authority, constituent, legislative, governmental, administrative or judicial, which is concerned ”. But the resolution carefully abstains from stating what is the international obligation of a state with reference to the expropriation of the property of foreigners by legislation. It throws no light on the point which is the subject of the present article.

The precedents, then, are not decisive. The precise point at issue has never been settled by any tribunal or other authority of

¹ *American Journal*, Vol. XX, Supplement, p. 201.

weight ; the dicta are not always clear, and when clear are often conflicting.

This brief review of the authorities may perhaps produce the impression that we have not distinguished the proposition as to property with sufficient clearness from other propositions as to the duty of governments in relation to foreigners within their jurisdiction. But in truth the absence of a clear distinction lies in the very nature of the problem, and, if we have erred, we err in the company of the Institute. The international duty of a government in respect of the property of foreigners cannot be dis severed from its international duty in relation to foreigners in other respects. It is, at least, difficult to suggest that a different standard of duty applies for the security of property and for the security of persons. And once it is seen that the international duty of a government in relation to foreigners in respect of their property is a duty which primarily it owes in relation to them as individuals, though in the present state of international law the enforcement of the duty is for the state of the foreigner, it becomes difficult to see why the standard of the duty of a government in relation to this particular class of individuals, and that normally a small class, should be different from the standard of its duty to its own citizens—which is not, of course, the same thing as its actual practice in regard to its own citizens.

But the duty of a government towards individuals in respect of their property varies with each successive stage of civilization ; it is not the same in the modern world as in ancient or medieval societies, nor is it the same in all countries to-day. A law-maker should hesitate long before decreeing any absolute rule as a dogma exempt from the relativity which is the condition of human organizations.

II. PRINCIPLES.

The precedents, then, put at the highest, do not give a solution. The matter must be considered on principle.

Before, however, we pass to the more general argument, there is a point to be considered which is almost one of fact, or at least of history : if states have not the same freedom to deal by law with the property of aliens as with the property of their own nationals, by what act or omission of their own have they been deprived of it ? Whiteacre belongs to a British subject : the British Parliament is sovereign to expropriate him how and when it pleases. The British subject sells Whiteacre to an alien : Parlia-

ment has lost a portion of its former power. But Parliament has done nothing and has omitted nothing. On what principle must it suffer an abridgement of its authority by the act of third parties—a British vendor and an alien purchaser—both of whom are in this respect persons subject to its power? When the British Legislature in 1870 passed the Nationality and Status of Aliens Act and for the first time allowed aliens to hold land in the United Kingdom, did it proleptically and unconsciously authorize this truncation of its own legitimate authority? There has, admittedly, been no international engagement entered into by the government of the United Kingdom, limiting or purporting to limit the authority of Parliament. Arguments used by Lord Palmerston in the case of the Sicilian Sulphur Monopoly or in any other case cannot have had this effect.

When we are considering whether or not international law has incorporated a doctrine which has a direct effect on the legislative competence of Parliament in a sphere so domestic as that of the treatment of property within its jurisdiction, it is reasonable to ask for clear evidence of the establishment of such a doctrine by the deliberate assent of the international persona as a whole. One cannot presume that any government, least of all a British government, has by implication surrendered a portion of its legislative power. The fact that international law, in a sense, forms part of the law of England, does not mean that the law of England is at the mercy of the arguments of the diplomatists or the reasonings of the learned.

It may be objected to this argument that it is extravagant to require proof of the express assent as a matter of history of every state to any doctrine of international law which abridges its own sovereignty; there are certain general doctrines which form part of modern civilization and must be taken to have been accepted in international law, whether their source is to be found in municipal law or the "reason of the thing" or even in "natural law".

Such an objection would, however, I think, be found to be based on a misconception of the argument. We are not dealing with some generally recognized rule of international conduct as between states and asking to be shown some positive act of domestic legislation accepting such a rule, but we are suggesting that particularly clear and cogent evidence is necessary to establish that a legislature, sovereign in municipal law (which is the proper field for sovereignty), has lost or abandoned, in what is its own particular sphere, a right to regulate the destination of a parcel of

its own territory otherwise than subject to conditions which it does not itself impose.

This brings us to another, closely connected, point. The advocates of the rule point to the general (but not universal) respect for private property in time of peace in the laws of at any rate¹ "the elder members of the family of nations" and argue that this respect "expresses the standard of right and justice which enlightened humanity has prescribed for itself in its domestic affairs", and so "this principle has become firmly embedded in the law of nations". But by what process of reasoning are we justified in transferring a legal limitation of municipal law affecting the power of a state in relation to those directly subject to its authority into a duty of a state in relation to other states? The limitations, of which an imposing list can be composed, are in the nature of constitutional limitations or arrangements and can be modified domestically without appeal to any external authority.² But it is a long step to convert a constitutional obligation into a duty of international law. The United States since its foundation has regarded its constitution with a just pride and reverence; but it has at times amended it. If all other nations had in the meantime adopted constitutions similar to that of the United States, would American constitutional principles have thereby become part of the law of nations, so that when the United States next desired to amend its constitution it would have had to consult foreign Powers—or pay damages for any loss suffered by foreign nationals in consequence of the amendment? Most modern nations have representative institutions, but it is not therefore a duty of international law that such institutions be maintained.³

¹ See a note by Mr. Chandler P. Anderson in *American Journal*, Vol. XXI, p. 525.

In this connexion the provisions of the present German Constitution are of interest. Expropriation without compensation is permissible under Article 153 (2) if enacted by a law of the Reich and not by a law of a constituent state. But Article 4 of the Constitution proclaims that "the universally recognized rules of international law are valid as binding constituent parts of the law of the German Reich". Must we then conclude that expropriation without compensation, though valid as against Germans, is invalid if extended to foreigners? Such a limitation of Article 153 (2) would surely have been difficult to propose to a legislative or constituent assembly!

² It is interesting to note that the Rumanian agrarian legislation which has given rise to the controversy between Hungary and Rumania was preceded by an amendment of the Rumanian Constitution in order to put its domestic legality beyond question (*Revue de Droit International*, 1927, p. 439).

³ Since the above was written, the attention of the writer has been called to a passage in Pufendorf's *Law of Nature and Nations* (II. 3. 23) where much the same thought is expressed:

"Now it is not proper or fair to constitute these (points on which many people and states agree) as a peculiar and distinct species of law; inasmuch as the reason why

It is an error to exalt domestic arrangements of economic or political expediency, which are relative to particular societies at particular times and which express not so much principles of justice as between man and man as the conditions on which the state deems it wise to regulate the common life, into fundamental principles of eternal morality which are to be enforceable as part of international law. And indeed, as we shall see shortly, this particular principle of municipal law is subject to exceptions or interpretations, which detract somewhat from its sanctity.

This brings us to the consideration of the ultimate point of principle. Constitutional or legal obligations of private law are subject to no international authority in so far as they relate to the property of the nationals of the legislating state within its own jurisdiction. Are they nevertheless subject to such an authority in regard to the property of aliens? If the precedents, as we have seen, give at the best an uncertain sound, does there nevertheless exist a compelling rule of general justice which an international court would be justified in holding to form part of international law?

The first and most obvious observation is that any such rule involves a direct limitation of the principle of national sovereignty in a domain peculiarly its own, namely, the conditions on which property lying within the national jurisdiction is to be owned and enjoyed. We have already glanced at the practical difficulty of discovering how and when as a matter of history national sovereignty has been in this respect limited, but the matter has also a more general—we had almost said a more philosophical—aspect. It is true that few international lawyers nowadays accept the Hegelian conception of national sovereignty as the highest and best realization of human potentialities, and true also that the maintenance of that doctrine in the extreme form in which it has sometimes been stated is incompatible with the development of international law. But it is another thing to go to the opposite extreme and deny the existence of a sphere where as a matter of law national sovereignty is supreme; national sovereignty has its

such constitutions are common to many nations doth not arise from any mutual covenant or obligation, but is wholly to be attributed to the particular pleasure of the several legislators, who by accident agreed in these ordinances without the least regard to one another. And therefore this kind of customs and decrees may be, and frequently are, altered by one people or kingdom, without advising with their neighbours."

(The quotation is from Kennetts' translation, 4th Edition, London, 1729.)

own domain in international law just as individual liberty has its own sphere in municipal law. The onus is on those who would limit the exercise of national liberty, to point to some superior interest of international society in whose name it is so clearly right to override it that the assent of the state concerned must be taken to have been given to the restriction, in the absence always of express convention, by the mere fact that the state concerned accepts civilized principles for its relations with other states. The Permanent Court of International Justice said in the *Lotus* affair:¹ "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed." Whether the application made by the majority of the Court in that particular case, of the principles so laid down be or be not accepted, the general statement of the principle that "Restrictions upon the independence of states cannot be presumed", will hardly be disputed, even if restrictions may be inferred, as the Permanent Court itself indicates, from something less than explicit acceptance.

Lotus
Case

Now we have seen already that there exists no authority entitling us to say that there is a generally accepted usage according to which the property of aliens is to be treated with exceptional favour as compared with the property of nationals. Can it then be argued that there exists such a superior international interest in the sacredness of private property, or so imperative a rule of international morality, as to justify the view that states must be taken to have accepted as a part of civilization the rule that a state which has adopted a policy of expropriation must differentiate in favour of alien property-owners? We are told that the right of property is the basis of modern civilization and therefore cannot be violated as against an alien without doing a wrong of

¹ Judgment No. 10, p. 18. M. Loder, at p. 34 of the same case, says: "International law is for the most part unwritten and lacks sanctions; it rests on a general consensus of opinion; on the acceptance by civilized states, members of the great community of nations, of rules, customs and existing conditions which they are bound to respect in their mutual relations, although neither committed to writing nor confirmed by convention. This body of rules is called international law." This language equally indicates that it has to be established for any particular rule that civilized states have accepted it, though the acceptance need not be evidenced by any particular diplomatic or public act.

which his state can complain.¹ But is the major premiss of this argument as applied indiscriminately to all forms of property—mining royalties, urban land and what you will—accepted by all educated opinion² throughout the civilized world? Have we really the right to say as a proposition of international law which is to be enforced—in whatever way that law is properly enforceable—against communities who take another view, that modern civilization requires in all times and in all places that all property of all kinds which is privately owned shall not pass from private to public ownership except on payment of full compensation, and that a state cannot form part of the modern civilized international community except upon the terms that it accepts this rule? The question so asked is not so much one of positive contemporary law as of politics and economics; it is not whether on the whole for most forms of property private ownership gives to the community better results than public ownership, but whether modern civilization requires the recognition of a general dogma raising the inviolability of private property into a public duty of states, a public duty which in the relationship of a state to its own nationals must remain moral³ only and not legal, but which nevertheless when aliens are concerned becomes an obligation of international law. It is surely impossible, whatever may be our views as to the relative merits of socialist and individualist doctrines, to assert that modern civilization requires all states to accept so unreservedly the theories of one side in the great economic dispute. If such fetters are to be imposed on the internal property legislation of states at a time when the predominant sentiment in the majority of states is in favour of private property, presumably, if the contrary doctrine should ever gain the upper hand, we might have private property or certain forms of it condemned as contrary to the public interest; a collectivist state 'A' might request its individualistic neighbour 'B' no longer to permit any nationals of 'A' to continue to own land in 'B'. Such a hypothesis may seem absurd but it serves to test the argument. General opinion in these matters has changed more than once in human history and may change again. In Ahab's time, in Palestine, expropriation of a family estate even with adequate compensation was thought to be an outrage; under the auspices of Lenin and Karl

¹ See Fauchille, *Traité de Droit International Public*, Tome I, 1^{ère} Partie, p. 934 (cited by the Hungarian Government).

² We are not here thinking of legislative enactments.

³ The inclusion of the principle in many constitutions does not, of course, prevent its being overridden by due process of constitutional amendment or of law.

Marx, in Russia, private property is—or was—considered a crime : in most European modern states to expropriate without compensation is felt to be at the lowest impolitic ; but it would surely be rash to erect any one set of these views into an international law which is to limit the national freedom of the members of international society. And be it observed that such an international law, impotent to aid that great majority of property owners whose property is in their own state, operates only by way of discrimination and only in favour of aliens ; it condemns as contrary to civilization legislation which *ex hypothesi* has been accepted for its own citizens by a state hitherto recognized as a member of international society. Are we to say that the action of Rumania and of Czechoslovakia in enacting their recent land laws was uncivilized ? We need not cite the case of Mexico, but the Union of South Africa ¹ is apparently also in danger of indictment. We have perhaps subjects enough of international discord without adding this to their number.

Let us suppose, for example, that a British Government (possibly, but not necessarily, of the Labour Party) should introduce and carry into law a Bill for the acquisition by the state of the London squares or of the property in coal and other minerals, giving either no compensation to the present owners or a compensation falling short of the market value. Our British ground landlords and coalowners will be without redress ; they will have to console themselves with the thought that such legislation is referred to by one Lord Chancellor, in writing the life of another, as a typical instance of an Act of Parliament which though unjust is nevertheless the law.² But an American owner will be entitled to invoke the aid of his Government and obtain from the British Government the full price of British land in the face of a British Act of Parliament. Great Britain has, as we have seen, not yet expressly accepted this doctrine as international law : is it wise for her now to throw her weight in favour of its acceptance and so create the possibility of one specially favoured class of owner of British property ?

The illustration may serve to bring home the danger of the doctrine. To seek to entrench individualism as against collec-

¹ The South African Parliament has recently had under consideration legislation as to diamonds which involves in the case of certain farms the acquisition by the Government of valuable rights of property without compensation to the owner. See *The Round Table* for September 1927, p. 849.

² Campbell's *Lives of the Chancellors* (Life of Lord Camden), Vol. V, p. 255. Murray, London, 1846.

tivism by a canon of international law, is not merely to take an economic doctrine out of the sphere of domestic legislation, where alone it properly belongs, but also to run a grave risk of discrediting international law in the eyes of those who accept collectivist doctrines either for all property or for a part of it. Such action will in the end neither help to preserve private property nor strengthen the power of international law.¹ International law has indeed nothing to do with domestic economic conflict; its authority must not be impaired nor its high impartiality endangered by dragging it into the *mêlée*.

These considerations have indeed not escaped the attention—whether conscious or subconscious is perhaps uncertain—of the advocates of the doctrine of the special duty to alien property owners. We must distinguish. The rule in fact is far less absolute in domestic matters than at first appeared. Great, powerful, and civilized states do not crudely and avowedly “confiscate” when they take or suppress private property; they adopt a more elegant procedure. Thus, by the issue of paper money they may destroy almost the whole of the public debts which they owe in their own currency whether to nationals or to aliens; unofficial protests by the holders of the securities of certain governments may have been made but no foreign Government has hitherto taken up the cause of its nationals. And, indeed, as we have already seen by the example of the German case cited, it would be very difficult to assert any legal claim.² A creditor in a national currency must follow the fate of the currency. But in substance a government which borrows when its currency is worth x , by its own action reduces x to $\frac{x}{10}$, and then repays its creditor a fraction only of the value which it borrowed, has confiscated the rest of that part of the creditor's property which was represented by the debt owing to him. If this confiscation gives no cause for international complaint—and there is a general agreement that it does not—it is difficult to predicate universal validity for the proposition that all confiscation of the private property of an alien is wrongful in international law.

The Constitution of the United States contains a provision that

¹ Cf. what Sankey J. said in *re Amalgamated Anthracite Collieries*, 43 T.L.R., p. 673 : “As has been said in another set of circumstances : the fact that opinion grounded on experience, has moved one way, does not preclude the possibility of its moving, on fresh experience, in the other. Nor does it bind succeeding generations when conditions have changed. After all, the question whether a particular thing is in the national interest is a question of the times and it is a question of fact.”

² *Giulini v. The Reich*. Reichsgericht IV, 359/26 ; January 27, 1927, p. 12 supra.

"No person shall . . . be deprived of life, liberty or *property* without due process of law; *nor shall private property be taken for public use without just compensation*". And yet the American courts with the support of American opinion have admitted an exception to, or qualification of, the general rule when the measure challenged can be considered to be an exercise of what is called the "police power"; an American writer of authority assures us that the exercise of the "police powers of the state in the regulation of the morals, health and safety of the community presents a fundamentally different question from confiscation of private property as a national policy, whether communistic or anti-foreign or merely for mercenary purposes".¹ What then is this fundamental difference?

This is not the place to attempt a discussion of the American developments of the legal doctrine of the "police power"—developments which could only have taken place in a country with a written constitution. In Great Britain, where Parliament is supreme and not restrained legally by any constitutional principles, the police power has expressed itself in legislation which no man can dispute; in the United States, legislation in exercise of the police power has frequently had to meet in a court of law the challenge of unconstitutionality. Notwithstanding, or, rather, in consequence of this challenge, it is evident that the doctrine of the police power is capable of very wide application; it has been defined with a vigour and generality which leave a student in doubt whether any frontier-line can properly be drawn to limit its actual or potential dominion.

Blackstone² in the eighteenth century gave the name of "public police and economy" to the "due regulation and domestic order of the Kingdom". In 1872 the Supreme Court of the United States³ gave the name of "the police power"—which it stated to be "incapable of any very exact definition or limitation"—to the general principle stated in a passage of Kent's Commentaries⁴ to the effect that "every person ought so to use his property as not to injure his neighbours and *private interests must be made subservient to the general interests of the Community*".

Recent American cases show us the "police power" as an engine of very formidable potency. The Supreme Court of the

¹ Mr. Chandler P. Anderson in the *American Journal of International Law*, Vol. XXI, p. 525.

² Commentaries, IV. 13.

³ Slaughter House Cases (1872), 16 Wall. 36.

⁴ II, p. 340. Italics not in the original.

United States has upheld under this doctrine legislation which in effect abolished without compensation the right to specially cheap transportation granted by a railway company to an individual in compensation for injuries received;¹ the Court has also upheld legislation suppressing without compensation a livery stable kept in a particular district,² and legislation reducing the value of real estate by a zoning ordinance.³ "The line", said the Supreme Court, "which in this field (of police power) separates the legitimate from the illegitimate assumption of power, is not capable of precise delimitation. It varies with circumstances and conditions."⁴ The Supreme Court of Michigan under the same doctrine has upheld, by a majority, the constitutionality of legislation for the sterilization of the unfit.⁵ The constitutional provision against taking private property for public use without just compensation must now clearly be read in the light of a judicial commentary which has modified the *prima facie* impression which would be created by the unassisted study of the text.

The doctrine of the police power has to some extent delivered the United States from the practical *impasse* to which we come if we seek to insist on an absolute rule that the rights of private property can never be diminished except in return for just or full compensation. But it will be well to bear in mind the possibility that the existence in the American Constitution of the rule to which we have referred may have had a certain psychological effect on the minds of American lawyers when they come to discuss this same question as one not of municipal but of international law.

Wherein then, we return to the question, lies this fundamental distinction between confiscatory legislation by the exercise of *dominium eminens*, eminent domain, on the one hand, and the exercise of the "police power" on the other? In both cases the state suppresses or diminishes the value of a form of private property hitherto lawfully enjoyed. The act of suppression is the same whether the thing affected be absinthe, as in the case of recent French legislation, or alcoholic liquor, as in the American case, or large landed properties, as in the case of some of the Suc-

¹ *Louisville & Nashville Railroad Coy. v. Mottley* (1911), 219 U.S. 467.

² *Reinman v. Little Rock* (1914), 237 U.S. 171.

(For these American citations the author is indebted to the article by Mr. Bullington in the *American Journal of International Law* above referred to.)

³ *Village of Euclid v. Ambler Realty Co.* (1926), 47 Supreme Court Reporter, 114.

⁴ *Ibid.*, p. 118.

⁵ *Smith v. Wayne Probate Judge* (1925), 231 Michigan 409.

cession States of Austria-Hungary.¹ The distinction, if one is to be drawn, must be either in the nature of the thing affected or in the motive which inspires the act of suppression. But, as to the nature of the thing affected, if state 'A' *bona fide* judges that alcoholic liquor, and state 'B' that large landed estates, or, to use the new jargon, "the idle rich" (all things which many people hold to be harmless) are bad for the morals or the social order of the community, why should state 'A' be entitled to assert its own view against the supposed general sense of international society, while state 'B' has to submit its action to the decision of some international tribunal? Possibly a distinction may be sought in the fate of the thing affected. It may be said that it makes all the difference whether the state acquires the property (whether permanently or temporarily with a view to redistribution, as may often be the case when land or real property is affected) or simply abolishes it, as in the case of alcoholic liquor. But such a distinction is surely unsound. The ultimate fate of the thing affected is perhaps relevant to an inquiry into the motive of the state—of which more shortly—but from the point of view of the individual and of convinced defenders of the sacredness of private property the act is the same; the individual has lost what was his lawful private property by the act of the state. In some cases the tangible thing affected—as, for example, land—continues to exist and may or may not become and remain state property or be parcelled out to peasant proprietors. In some cases the thing affected consists of intangible rights, such, for example, as the right to carry on a particular trade, either generally or in a particular place, and these rights are suppressed. In other cases again the thing affected is tangible and is considered to be wholly noxious and removed from the *rerum natura*—so far as the legislature of a single state can remove it. But the substance of the process from the point of view of the individual is the same; he has lost his property rights, tangible or intangible, and has received no adequate compensation.²

¹ No true distinction can be drawn between the confiscation of tangible property and the suppression of a right which has a market value, between the expropriation of a landowner and the annihilation of the business of a brewer. "You take my life when you do take the means whereby I live."

² If we were seeking now for the first time to establish the limits of the exercise of the "police power", it might be tempting to submit an argument that the essential characteristic of that power is the suppression of something considered to be evil, the removal of an obstruction to the free life of the community, without allowing the thing suppressed to survive whether in state ownership or otherwise. But even if such an argument were accepted, the fact would still remain that the "police power" is used

Thus, the only line of argument remaining open would seem to be an attempt to base the distinction between the confiscation which legitimately may be carried through without compensation and the confiscation which is illegitimate unless accompanied by compensation, on the nature of the motive which inspires or is thought to inspire the legislating state. The motives of individuals are often difficult enough to determine by legal inquiry, but such an inquiry is surely both impracticable and impertinent in the case of a state. It might not be easy to say whose were the minds whose thoughts are to be triable, and an inquiry as to the existence of a particular motive on the part of a state, an inquiry undertaken with a view to condemning or acquitting that state to or of international responsibility, seems to be dangerously akin to an inquiry whether the state had or had not a *mens rea* in legislating. Such an inquiry would be very different from the inquiries as to the negligence or international wrong-doing of individual officials which are common enough in international litigation. It would be directed to the mind, not of individuals, but of a legislative body, and the point at issue would be not the formal intention of that mind but whether or not the motive inspiring that intention was to regulate "public morals, health and safety" or to make private interests "subservient to the general interests of the community". It is surely fantastic to suppose that states would expressly or impliedly consent, or that there now exists any international law requiring them, to submit to such an inquisition as to domestic legislation passed by their own legislatures and to agree that its validity is to depend on a foreign estimate of the motives of statesmen, of legislatures, or of peoples.

It is indeed evident that the judgment of the expropriating state itself that the necessity for the sacrifice of private property has arisen, must be accepted as final. "Does anyone",¹ David Hume asked this question more than 150 years ago, "scruple in extraordinary cases to violate all regard to the private property of individuals, and sacrifice to public interest a distinction which had been established for the sake of that interest?" Whether the extraordinary case has arisen, the state itself must decide.

to suppress without compensation property hitherto considered lawful. And in any event it may be doubted whether the argument would give the desired result of establishing a sound distinction between two kinds of state action. It would be argued that when large landed estates are broken up, what is suppressed is not the land itself but a particular method of ownership of land and that this method of ownership is destroyed just as effectively as alcoholic liquor under American legislation.

¹ *Essays*, Edinburgh, 1809, Vol. II, p. 244, "On Justice".

But if this proposition be disputed and an international authority is to be invoked, the jurisdiction of that authority cannot be ousted by the mere assertion of the defendant state that it is exercising a "police power". The international authority must try the issue raised by the defence.

If such a contention be raised squarely in modern Europe—and even perhaps in other continents—there can be little doubt as to the answer which independent states will give.¹

The history of the suppression of slavery shows that it may not always be easy to establish a concurrence of civilized opinion on the point whether or not a state which destroys property rights hitherto considered legitimate, is or is not bound to compensate the owner. The British Government compensated the West Indian slave-owners; the American Government paid not a cent of compensation and this precedent will apparently be followed by Great Britain in the Sierra Leone Protectorate. In ancient Greece the same problem had arisen when the Thebans liberated the Messenian serfs of the Spartans in 370 B. C. Was this a theft of the private property of Sparta? Isocrates argued that it was.²

The principle of the intangibility of foreign property may thus in practice be made of little effect by the exercise of the doctrine of the "police power"; the fact that a principle is so fragile and so easily evaded surely diminishes its title to respect. The American cases suggest that the reconciliation of a general principle so wide as that of the police power with a constitutional provision forbidding the taking of private property for public use without just compensation is a problem for which legal theory has as yet found no satisfactory solution. The inquirer may at any rate draw the conclusion that the mere fact that sweeping general propositions as to the superiority of the public interests have been laid down in the United States in the domestic sphere by recog-

¹ See e. g. *Le Temps* (a journal which no one will accuse of socialistic sympathies) of September 3, 1927; speaking of a claim to submit expropriatory legislation to an international court, the leading article says that such a claim "met en cause le principe même de la souveraineté de l'État sur son propre territoire, principe sur lequel aucun gouvernement responsable ne peut transiger". *Le Temps* cannot, of course, be cited as an authority to prove what is the existing law, but the article may serve to suggest the difficulties in the way of enforcing the general principle of the rights of aliens which is alleged to form part of international law at the present time.

"But would those reasoners look abroad into the world, they would meet with nothing that in the least corresponds to their ideas or can warrant so refined and philosophical a system." Hume, Essay "On the Original Contract".

² See the chapter on "Greek Political Thought and Theory in the Fourth Century" by Dr. Ernest Barker in the *Cambridge Ancient History*, Vol. VI, p. 529.

nized authority, emphasizes the need for caution in allowing universal validity in the international field for the limitation involved in the assertion of the necessity for full compensation on the expropriation of private ownership.

Resort to the "police power" is not the only way in which the principle of the intangibility of private property after being accepted in word might be evaded in fact. The power of taxation might be used by a state with collectivist leanings in such a way as to deprive owners of a large part of the profits arising from the property—a heavy income tax—or to make large inroads on private capital value—heavy death duties or a capital levy. If such taxation is enacted and applied indiscriminately to nationals and aliens, it would hardly be contended, in the absence, always, of some special international obligation, that any general international duty is violated by the taxing state. And yet both in fact and in theory taxation involves the forcible taking of economic value from the individual by the state; it differs only from confiscation in the fact that taxation as a general rule is a claim expressed in currency, not a demand for the surrender of a specific object.

Nationalisation

III. CONCLUSIONS.

We conclude then that where no treaty or other contractual or quasi-contractual obligation exists by which a state is bound in its relations to foreign owners of property, no general principle of international law compels it not to expropriate except on terms of paying full or "adequate" compensation. This is, of course, not to say that such expropriation is wise or politic or even moral; those are issues which the state concerned must decide. Our examination seems, however, to have established that the supposed obligation of states in this respect has never taken shape in any formulated rule of international law accepted by the international community, and also that this supposed obligation is not imposed by any generally accepted maxim of conduct of such a nature as to form part of the international duties of states.

This conclusion does not imply that a state in the absence of treaty or contractual obligation is free to discriminate against foreigners and attack their property alone. Such a discrimination would rightly be regarded by the states of the foreigners affected as an unfriendly act inconsistent with the relations which ought to subsist between the members of the international society.

We may even go further. Law should be impartial as between

aliens and nationals, but it must be law, not disorganized and tyrannical violence. There are conditions conceivable in which it would not be a sufficient answer for a confiscating state to say that it was treating its own nationals and aliens in the same way. Apart from cases in which the plea might be dismissed as a subterfuge, a case, for example, in which in fact the whole or nearly the whole of the particular class of property affected is held by foreigners, a state might be in a condition so anarchical that such a defence would be no more valid in the case of loss of property than it would be for a loss of life. Such, for example, may have been the case of many of the confiscations enacted in Russia.¹ Or again, a state could not excuse itself by a plea that it treated foreigners and nationals alike if it re-enacted the status of slavery.² For the confiscation of property it may well be that the same rule is applicable as that which only the other day an international tribunal laid down in a case where a life had been lost: "The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty"³ This is not the language in which all sober men in civilized countries would at the present time describe any and every measure of expropriation which, though not accompanied by full compensation, was undertaken deliberately by a civilized government and applied impartially to aliens and nationals in pursuit of a policy which that government, rightly or wrongly, acting within the sphere of its own independent authority, conceives to be in the interests of the peace, order, and good government of the territory and people committed to its charge. But sober men would apply such language to a reintroduction of slavery. To insist in the defence of property alone on a standard more rigid than this is to rate property more highly than life. It must not be said with any plausibility of the sages and founders of a civilized international law that their legislation takes sides in the domestic conflict between the "haves" and the "have-nots".

One observation of a practical character may be added. It is unlikely that it will be sought to put in force the supposed rule in

¹ Thus M. Poincaré, speaking in the French Chamber on June 2, 1922, claimed complete indemnity for French nationals whose real property was confiscated by the Soviet Government.

² This illustration is given by M. Anzilotti (Hungarian Documents, *ubi supra*, p. 155) to prove that "national treatment" is not necessarily an answer to a complaint of the oppressive treatment of aliens.

³ Quoted from the head note to the case of *Neer v. Mexico*, General Claims Commission. U.S. and Mexico. Reported in *American Journal of International Law*, Vol. XXI, p. 555.

Neer
Claim

cases where aliens hold only a small proportion of the property affected. Such cases may therefore be neglected in practice. But when it is desired to protect large alien holdings of particular classes of property, the rights of the property holders should be secured by an express agreement and not left to depend on a disputed general doctrine, which, even if accepted in word, can be avoided in fact, and which in its unqualified form would bring international law into the economic conflict and set it in opposition to at least two of the most powerful currents of human feeling.¹

¹ This article was written before the writer had the advantage of being acquainted with the views expressed by MM. Albéric Rolin and Léon Duguit in the *Revue de Droit International et de Législation Comparée* for 1927, at pp. 438 and 469 respectively. On the particular point dealt with in this article the writer is happy to find himself in agreement with these eminent authorities, even if he does not reach his conclusions by precisely the same methods. But it may again be well to repeat that he expresses no opinion on the main point in controversy between Hungary and Rumania.

THE TREATMENT OF MAILS IN TIME OF WAR

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It has long been recognized that a few lines of a letter delivered to an enemy may be as useful or more useful to him than a cargo of arms and ammunition.¹ The interruption of enemy communications has, therefore, always been one of the objects of maritime warfare.

The Declaration of London, embodying generally recognized principles, stated that a neutral vessel exclusively devoted to the transmission of intelligence in the interest of the enemy was guilty of unneutral service (*assistance hostile*) and was subject to the penalty of being treated as an enemy merchant ship (Article 46). It was also provided that a neutral vessel on a voyage with a view to the transmission of intelligence in the interest of the enemy was liable to the same treatment as a neutral vessel engaged in the carriage of contraband (Article 45). These are cases of the direct and voluntary intervention of neutrals in the war, but they are not the type of assistance to belligerents with which we are here primarily concerned. The subject under consideration is the more ordinary occurrence of the carriage of mails in the everyday course of business, the contents of the mail bags being unknown to the carrier. In such cases there is no intention on the part of the ship-owner or master to intermeddle in the war and no question of unneutral service involving the fate of the ship. The problem to be considered is the following: by what means can belligerents lawfully protect themselves from any transportation by sea by neutral vessels of correspondence or mail matter which may lend co-operation and assistance to their enemies without unduly hampering the ordinary means of communication by mail between the peoples of the world? The only method hitherto in force has consisted in visit and search of ships at sea and the censorship of mails falling into the hands of the belligerent.

Without entering, for the present, into the details of the treatment of mails in the wars of the period anterior to 1907, we may begin our inquiry at the Second Hague Peace Conference, 1907,

¹ *The Atalanta*, 6 C. Rob., p. 440.

when the Fourth Commission presented a report to the Conference on the protection of postal correspondence at sea in time of war. The report, presented by M. Henri Fromageot, accompanied the first chapter of what subsequently became the Eleventh Convention, which is relative to certain restrictions with regard to the exercise of the right of capture in naval war. It was therein stated that in the present state of international law the transportation of postal correspondence at sea is not effectively guaranteed in time of war, with the result that mail bags carried by sea ordinarily undergo seizure, opening, examination, confiscation if need be, in all cases delay and even loss.

The Convention is divided into four chapters, of which Chapter I relates to postal correspondence and contains the two following articles :

“ *Article 1.* The correspondence of neutrals or of belligerents, whether official or private in character, found at sea (*en mer*) on board a neutral or enemy ship, is inviolable. If the ship is detained (*saisie*), the correspondence is forwarded with the least possible delay by the captor.

“ The provisions of the preceding paragraph do not apply in case of violation of blockade to the correspondence destined for or proceeding from a blockaded port.”

“ *Article 2.* The inviolability of neutral correspondence does not exempt neutral mail ships from the laws and customs of naval war respecting neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary (*la visite n'en doit être effectuée qu'en cas de nécessité*), and with as much consideration and expedition as possible.”

The Convention was not signed by Russia, nor was it ratified by the following belligerents during the war of 1914–18 : Bulgaria, Greece, Italy, Serbia, and Turkey.

The proposal which ultimately became the foregoing articles of the Eleventh Convention was introduced by the German Delegation ; the subject was not mentioned in the original agenda for the Conference. Dr. Kriege, in explaining the purport of the German draft, pointed out that as so many private commercial interests depended upon the regular mail service, it was indispensable to remove the service from the disturbance of naval warfare.

“ It is hardly possible ”, he said, “ that the belligerents who control the means of telegraphic and wireless communications will have recourse to the use of the ordinary mail for official communications as to military operations. The advantage to be drawn by belligerents from the control of the postal service is not in proportion to the prejudicial effect which that control entails on legitimate correspondence.”¹

From the discussions between the Allied Powers and various

¹ *Actes et documents*, iii, p. 86.

neutral Powers which took place on the subject of this Convention during the late war, it appears that Article 1 is capable of two diametrically opposed meanings. According to one of these interpretations the article imposes an absolute prohibition on any interference with the transport of postal correspondence, whether carried on enemy or neutral ships, and on the examination of the mail bags whatever may be the nature of the contents of the bags and of the correspondence carried. Inviolability, according to this interpretation, means complete immunity from interference ; mail bags containing postal correspondence must be left intact by the belligerents. According to the other interpretation, the immunity of postal correspondence does not stand in the way of the examination by the belligerent of the mail bags, and, in case of grave suspicion, of the letters themselves, in order to ascertain if they contain objects of a contraband character or are otherwise noxious ; in other words, the belligerent is entitled to examine the contents of the mail bags to ascertain if they are genuine postal correspondence.¹ It was in the latter sense that the belligerent Powers interpreted the Convention, and after some correspondence between Great Britain and France with the United States, the latter Power accepted a similar interpretation. Some other neutral states, particularly Sweden and Holland, protested against the Entente Allies' treatment of the mails, and the relations between Great Britain and Sweden were for a time very strained.²

In the early days of the war in 1914, the British and French Governments did not interfere with mails carried on board neutral ships, but an examination of the mails on board ships entering British and French ports soon showed those Powers that the argument advanced by the German delegate in 1907 bore little relation to the facts of war. The Central Powers endeavoured, under cover of the mails, to evade the Allied restrictions in respect of contraband and the measures enforced under the Retaliatory Order in Council of March 11, 1915, and the corresponding French Decree. The efforts of the Central Powers in this direction took the form of attempting to import goods through the postal service, attempts to export goods by the same means, attempts to establish credits in foreign countries by sending through the mails money orders, drafts, bills of lading, &c., as well as " the organization of a system of incendiarism and sabotage in countries from which the Entente Allies were drawing supplies of arms and

¹ J. H. W. Verzijl, *Le Droit des Prises dans la grande Guerre*, p. 713.

² *Parl. Papers*, Misc. No. 28 (1916).

ammunition " and the organization and carrying on of propaganda in foreign countries, and especially the distribution of literature in India inciting the people to rebel.¹ In consequence of this evidence of the use to which the mails were being put, towards the end of 1915 the British and French Governments ordered an examination of mails found on board all vessels bound for Scandinavian and Dutch ports. This examination revealed the extent of the traffic under cover of the mails, not only in the parcels mail but also in the letter mail. In many cases the postage paid was in excess of the normal value of the article sent.² As regards the parcels mail, Dr. Kriege, in his speech introducing his proposals at The Hague, stated that they were not intended to include parcels sent by post (*les colis postaux* ³) and this view was taken by the British and French Prize Courts.⁴ The United States Government also took the view that articles sent by parcels post were subject to " the same treatment as articles sent by express or freight in respect to belligerent search, seizure and condemnation ".⁵

The Eleventh Convention contained an article (Article 9), common to nearly all the conventions signed at The Hague in 1907, which stated that the provisions of the Convention are only applicable between the contracting Powers and only if all the belligerents are parties to the Convention. This article is often referred to as the " Kriege " clause from the fact that Dr. Kriege, one of the German delegates, was its author.

It has already been pointed out that several of the belligerents in the war of 1914-18 had either not signed or not ratified the Eleventh Convention. It was, therefore, arguable that by virtue of the article just quoted the convention did not come into operation. Professor A. S. Hershey, of the University of Indiana, wrote in July 1916 : " It cannot be said that the Eleventh Convention of 1907 is legally binding in this war ; it has not been signed by Russia, one of the leading belligerents, and it has not been ratified by more than half of the states represented at the Second Hague Conference. " ⁶ The late Professor C. D. Allin,

¹ J. W. Garner, *International Law and the World War*, Vol. II, p. 350.

² Professor Garner gives an interesting list of articles sent by both letter and parcels mail, and mentions the case of a parcel of dried meat weighing 12 lb., sent from the United States, on which postage stamps to the value of \$9.60 had been affixed. *Op. cit.*, p. 352.

³ *Actes et documents*, iii, p. 861.

⁴ *The Simla*, 1 B. & C., p. 287. *The Barcelo*, Fauchille, *Jurisprudence Française*, p. 84.

⁵ *American Journal of International Law*, Vol. X (1916), Spec. Supp., p. 404.

⁶ *Ibid.*, Vol. X, p. 510.

of the University of Minnesota, also dealt with the Convention as being of doubtful application.¹ In a case which came before the German Supreme Prize Court in January, 1919 (i.e. after the Armistice) the Convention was interpreted in the sense which had been given by the British, French, and United States Governments, but the Court added: "It can remain unargued whether, having regard to the universal application clause contained in the final provisions (Article 9), the convention can be invoked at all *vis-à-vis* Germany, in the present war, seeing that Russia and Italy have not ratified it."²

The question whether the Convention was in force during the late war was never fully argued in the British Prize Court. The Convention was referred to in the following cases: *The Simla*,³ in which no claimant appeared and Sir Samuel Evans condemned goods sent by parcels post on the argument of the Procurator-General that the Convention did not apply to such parcels; *The Tubantia and other ships*,⁴ in which the Court held that rubber sent as samples by letter post was not postal correspondence within the meaning of the Convention; *The Noordam*,⁵ in which the Judicial Committee of the Privy Council, without defining "postal correspondence", decided that certain securities seized in the letter mail were "goods" and did not fall within that term. It follows from these decisions that if a belligerent is entitled to exercise his ordinary right of search and seizure over articles carried in the mails, he is entitled to open all packets which may reasonably be expected to contain such articles. The Government of the United States, in a dispatch of May 24, 1915, appears to take the same view, though contending that "genuine correspondence" is inviolable. They admitted the right of a belligerent to examine all mail bags to ascertain if they contained contraband, thereby interpreting the principle of "inviolability" as being only equal to that of non-confiscability.

Germany and Austria-Hungary contended that the Convention was not binding on them as it had not been ratified by all the belligerents.⁶ Their interference with the mails was of a very different character from that of the Entente Allies. It was pointed out in the Joint Memorandum of February 15, 1916, pre-

¹ *Minnesota Law Review*, April 1917.

² *The Koningin Regentes*, quoted by J. H. W. Verzijl, *op. cit.*, p. 714.

³ v.s.

⁴ 5 Lloyd's Rep., 262.

⁵ 3 B. & C.P.C. 488.

⁶ Germany made an official intimation to Siam that she did not consider the convention binding as all the belligerents were not parties. (Clunet, *Journal de Droit International*, Vol. XLV, p. 1316, Vol. XLVI, p. 420.)

sented to the United States by Great Britain and France on April 3, 1916, that "between December 31, 1914, and December 31, 1915, the German or Austro-Hungarian naval authorities destroyed, without previous warning or visitation, thirteen mail ships with the mail bags on board, coming from or going to neutral or allied countries, without any more concern about the inviolability of the despatches and correspondence they carried than about the lives of the inoffensive persons aboard the ships".¹

In fact, for one reason or another, the provisions of the Hague Convention were not observed by any of the belligerents, and though the Allied Governments stated in a dispatch of October 12, 1916, that they had not "for the present" refused "to observe the terms of the Convention 'reasonably interpreted', they had not admitted and could not admit that there was therein a final provision legally binding them, from which they could not possibly depart. The Allied Governments expressly reserved to themselves the right to do so in case enemy abuses and frauds, dissimulations and deceits should make such measure necessary".²

As the war progressed, all the belligerents seized mail bags, neutral or enemy, and censored them, and the "inviolability" of mail bags which the Convention purported to introduce was ignored. The correspondence between the Allied Governments and the United States did not reveal any real differences of principle as regards the right of belligerents to examine the mails; there were some differences as to what constituted "genuine correspondence", but the fundamental difference between them turned on the methods adopted by the Allies in their exercise of the right of visit and search. This had special reference to the diversion of neutral vessels to port for the purpose of search and censorship, and this is a question which was not limited to the mails and has already been discussed in its general aspects in a former number of this Year Book.³ The late Professor C. D. Allin agreed that the real crux of the whole controversy was the question of visit and search which the Allied Governments sought to exercise in a mode advantageous to themselves as belligerents; they gave a broad construction to this general right and the United States challenged the legality of the procedure. Professor A. S. Hershey, discussing the same subject, concluded that "on this point the Allies would seem to have the best of the argument.

¹ *American Journal of International Law*, Vol. X (1916), Spec. Supp., p. 408.

² *Ibid.*, p. 42.

³ See my Article on "Visit, Search and Detention" in the volume for 1926, p. 43.

The attitude of the United States appears to be needlessly obstructive, legalistic and technical".¹ With this conclusion Professor Allin found himself in general agreement.²

It is, in my opinion, doubtful if the construction placed upon the word "inviolability" in the Convention, by the Governments and Prize Courts of the Allied belligerent states and in principle agreed to by the United States, would be upheld by an international arbitral tribunal. Some of the neutral states in the late war took a very different view of its meaning. This ambiguity may be the cause of acute international differences during some future war. The Convention was not, in my opinion, legally binding on the belligerents during the late war, and possibly the doubt as to its applicability led to the wide construction being placed upon its terms. If "inviolability" means complete immunity from all interference with mails, enemy and neutral, private and official, it puts an end to all censorship of mails found in ships at sea, though it would not stand in the way of the censorship of mails on ships voluntarily entering the jurisdiction of the belligerent states. It would mean that belligerents were unable to examine the contents of mail bags to ascertain whether they consisted only of genuine correspondence, or also contained securities and documents of value, such as money orders, cheques, drafts, and other negotiable instruments which the Allied Powers and the United States agreed might be considered as of the same nature as merchandise or other articles of property and, therefore, subject to the same exercise of belligerent rights;³ though such immunity would not apply to the parcels mail. Furthermore, the existence of the "Kriege" clause, rendering the Convention binding only if all the belligerents are parties, renders its application in any future war a matter of uncertainty, and where Great Britain is a belligerent it may not prevent a British Prize Court from holding that the Convention is binding on Great Britain though other belligerents were not parties, as was held in the case of the Sixth Hague Convention, 1907.⁴ For these reasons, which are very similar to those adduced by the British Government in denouncing the Sixth Hague Convention in November 1925, it appears to me that the first chapter of the Eleventh Convention should be similarly treated.

¹ *American Journal of International Law*, Vol. X (1916), p. 583.

² *Minnesota Law Review*, April 1917, p. 19.

³ *American Journal of International Law*, Vol. X (1916), Spec. Supp., pp. 417, 425.

⁴ In *The Blonde*, *The Prosper*, and *The Hercules*, 3 B. & C.P.C. 875.

It remains to examine the question of the treatment of mails apart from the provisions of the Eleventh Hague Convention. Under the Postal Union Convention the members of the Union enjoy the right of interchanging closed mails, but the British Government exercised the right of censoring such mails during the South African war, and it is generally agreed that the provisions of the Postal Convention do not apply in time of war. It was agreed between the Allies and the United States that the Convention was "foreign to the question under consideration between them".¹

As regards mails on board vessels voluntarily entering the jurisdiction of a belligerent, his right to censor them will depend on the territorial law in force. As regards these rules, British and American law are in agreement that it is in conformity with general principles that merchant ships entering foreign ports are subject to the local jurisdiction where the safety of the state is concerned.²

The work of the censorship during the late war was very heavy and very important. A large proportion of the evidence in prize cases was provided from this source. It was publicly stated at the end of 1917 that there were more than four thousand persons engaged in the postal censorship, of whom more than thirteen hundred were working in Liverpool dealing with the American and Canadian mails. After the United States became a belligerent the censoring of the mails between the United States and Europe was left to the British censorship. The number of letters censored daily in December 1917 was about 375,000, weighing four tons. In addition to these, 117,000 newspaper packets and over 2,000 parcels were examined daily. The total weight of mail matter examined daily was estimated at 25 tons. It was through this method that millions of pounds worth of securities destined for the benefit of the enemy were detained and innumerable enemy intermediaries or "cloaks" for enemy trade were detected. The printed matter contained tons of enemy propaganda, often bound up in innocent looking school books, intended to stir up disaffection in the Allied countries.

As regards the treatment of mail ships and mails on board such ships on the high seas, the position from the point of international

¹ *American Journal of International Law*, Vol. X (1916), Spec. Supp., pp. 413, 416.

² *U.S. v. Dickelman*, 92 U.S. Rep. 520; *The Industria*, Forsyth, *Cases and Opinions on Constitutional Law*, p. 399; *The Fortuna*, 5 C. Rob. 27. See on the subject generally, A. H. Charteris, "The Legal Position of Merchantmen in foreign territorial Ports and national Waters", *British Year Book of International Law*, 1920-1, pp. 44-96.

law is not so clear. No general rule of international law exists putting such ships in any other position than that of ordinary merchant ships. Some states have entered into special conventions providing for the continuance of the mail service in time of war, such as the convention of October 14, 1843, between Great Britain and Holland, and a similar convention of August 30, 1890, between Great Britain and France. In both of these conventions it is provided that in case of war between the two nations the vessels employed in the conveyance of the mails shall continue their navigation without impediment or molestation, until notice is given by either of the two Governments that the service is to be discontinued, in which case they shall be permitted to return freely, and under special protection, to their own country. Except where similar arrangements exist, enemy mail ships may be captured and the mails on board censored and those of a noxious character confiscated. Innocent mails should be forwarded at the earliest opportunity. Neutral mail ships remain subject to the rules of visit and search and such right can be exercised whether the ship is sailing between two neutral ports or between a neutral and an enemy port. But the justification for a detailed examination of the mail bags on board after diversion to a port, and the censorship of the mails, will require to be based on much stronger grounds in the former than in the latter case, and if there can be no reasonable probability that the ship contains noxious matter, neutrals will be on strong ground in protesting against interference in the voyage of a mail ship. The right of a belligerent to examine mails on neutral ships was conceded by Mr. Bryan, the United States Secretary of State, in his letter of January 20, 1915, to Mr. Stone, Chairman of the Foreign Relations Committee of the Senate, in which, replying to his criticism on the State Department's inactivity to uphold neutral rights regarding censorship of the mails and destruction of American letters on neutral vessels, he said :

"As to the censorship of mails, Germany as well as Great Britain has pursued this course in regard to private letters falling into their hands. The unquestioned right to adopt a measure of this sort makes objection to it inadvisable. . . . Complaints have come to the Department that mail on board neutral steamers had been opened and detained, but there seem to be but few cases where the mail from neutral countries has not been finally delivered. When mail is sent to belligerent countries open and is of a neutral and private character it has not been molested, so far as the Department is advised."¹

The practice of censoring letters on board neutral vessels when for any reason they were detained seems to have been the practice

¹ *American Journal of International Law*, Vol. IX (1915), Spec. Supp., p. 256.

in the Napoleonic wars, and Professor Allin quotes the following letter from the American Consul in London of February 14, 1812 :

" The enclosed letter was on board the ship *Vigilant* (Joshua Coombs, Master) bound from Amsterdam to Boston, which vessel having been sent into Yarmouth by a British Ship of War, for adjudication, all the letters on board were opened and examined under the authority of the Court of Admiralty, as is usual in such case. The *Vigilant* being now released, the letters have been returned to me, and I have deemed it my duty to enclose them to persons to whom they are addressed." ¹

A more lenient treatment of mail ships was finding favour in the latter part of the nineteenth century, and in several cases special arrangements were made as regards mail ships using certain ports, whereby they were freed from examination. Such an arrangement was made between Great Britain and Germany during the South African war.² But in modern times mails have been interfered with more or less. Both the Russian and Japanese Prize Courts recognized the right to examine mails, and though the United States Government protested against the Russian action it was based on its being opposed to the more " liberal tendency of recent international usage ". Dr. Charles Cheney Hyde, giving examples of this tendency, says " it is not believed that maritime states prior to the Second Hague Peace Conference were generally agreed that the mails on neutral ships on the high seas were inviolable ".³ There was certainly no rule of international law requiring belligerent states to treat enemy official dispatches found on board an enemy or neutral ship as inviolable, and requiring such belligerent, if he captured the ship, to forward such dispatches to their destination as is provided by the Eleventh Hague Convention. Presumably owing to the fact that Germany and Austria did not consider the Convention operative during the war, no protests appear to have been made against the non-fulfilment of such injunction, but unless the parties to it take the necessary steps to free themselves from what will certainly be found to be a dangerous position, it will be their duty to observe the Convention in any future war in which the Convention is in operation.

Apart from the provisions of that Convention, there does not appear to have been any alteration in the legal position of mails since Dana wrote the following note in his edition of Wheaton :

" No settled practice of nations has excepted public mails, carried on private vessels, from search made with the purpose of ascertaining the character, em-

¹ *Op. cit.*, p. 1.

² *Parl. Papers*, Africa No. 1 (1900).

³ *International Law*, Vol. II, p. 446.

ployment, destination or ownership of that particular vessel or cargo, or for the purpose of ascertaining whether the vessel is acting as a carrier or despatch boat in the service of the enemy's Government. In principle and on authority there is no such exemption. The belligerent may search the private vessel to see if she or her cargo or any part of it, is, for any cause, lawful prize. The law allows immunity from search to no deposit of information. The danger of giving immunity from examination to the mails would be, not only that the neutrals might so carry all contraband despatches for the enemy's government and in its service, without much danger of detection or prevention, but the actual papers and instructions of the ship and cargo would always be placed in his own mail, and only the ostensible ones be produced, and so the ship would not be obliged to incur even the slight risk and inconvenience of sending the real papers by a different conveyance."¹

A large amount of enemy propaganda was seized and destroyed during the late war, but there appears to be no reason why it should not be treated as analogues of contraband and formally condemned. Postal correspondence, if the Hague Convention is not taken into consideration, other than official enemy communications or those which might prove of direct assistance in the conduct of the war, should be forwarded, after censoring, with the least possible delay.

For the reasons already adduced it does not appear that the provisions of the Eleventh Hague Convention solve the problem of protecting neutral correspondence from interference and at the same time safeguarding belligerent interests. Probably this can only be done in the future, as it has sometimes been done in the past, by special agreements between belligerents and neutrals limiting the right of search of mail ships on certain specified routes or voyages.

¹ H. Wheaton, *Elements of International Law*, p. 660.

THE THEORY OF IMPLIED STATE COMPLICITY IN INTERNATIONAL CLAIMS

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It is well-established law that a state does not *guarantee* the person or property of a foreigner on its territory. It is liable only for its *own* delinquencies, which means, since the state itself is an abstraction, for such injurious acts or omissions of "authorities" of the state, as international law, on principles of which the main outlines at least are well settled, attributes to the state itself; it is not liable for the acts of a private individual, who is not an "authority" of the state. On the other hand, in the words of Professor Borchard:

"A long line of cases has established certain qualifications upon the non-liability of the government for the wrongful acts of private individuals. These consist in certain manifestations of the *actual or implied complicity* of the government in the act, *before or after it*, either by directly ratifying or approving it, or by an implied, tacit or constructive approval in the negligent failure to prevent the injury, or to investigate the case, or to punish the individual, or to enable the victim to pursue his civil remedies against the offender. . . . The failure of a government to use due diligence to prevent a private injury is a well-recognized ground of international responsibility. . . . A more frequent basis of government liability is the failure, after reasonable opportunity, to bring the offenders to justice. Incidental to this ground of liability is the inadequate punishment of guilty individuals, negligently permitting them to escape, or an inexcusable delay in investigating the facts."¹

Professor Borchard supports this statement of the law with ample references to authorities. It will be observed that these "qualifications" of the non-liability of the state for the acts of individuals are not, in strict theory, exceptions to the general rule. Even in these cases the state is still not liable for the act of an individual *as such*, but only for its own delinquency; but the theory of the law has been that wrongful failure either to prevent or to punish the individual's act justifies us in inferring the state's "complicity" in the act, and consequently in regarding the act as the act of the state. It is the purpose of this article to consider how far this theory of "complicity" as a basis of state liability is sound, with special reference to certain recent awards of the General Claims

¹ *Diplomatic Protection of Citizens Abroad*, p. 217. (The italics are mine.)

Commission between the United States and Mexico in which it has been severely criticized.

The most instructive of these cases is one in which the United States claimed \$25,000 damages, alleged in its memorial to have been "suffered on account of the murder" of Byron Everett Janes, an American citizen, the claim being expressed to be presented "on behalf of" the widow and other members of Janes's family.¹ It appeared that Janes was shot by a discharged employee of a mining firm of which he was superintendent; the murderer was never apprehended, and the Commission was of opinion on the facts "that there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer as to warrant an award of indemnity". The opinion of the majority (Van Vollenhoven, President, and Fernandez MacGregor, Mexican Commissioner), after pointing out that international awards in respect of a state's lack of diligence in apprehending or punishing a culprit have sometimes been based on the theory that such lack of diligence argues a kind of complicity of the state with the culprit, went on to reject this theory in the following passage :

"A reasoning based on presumed complicity may have some sound foundation in cases of non-prevention, where a government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of non-repression. Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the state, so far from having transgressed its own penal code (which perhaps not even is applicable to it) has transgressed a provision of international law as to state duties. The culprit cannot be sentenced in criminal or civil procedure unless his guilt or intention in causing the victim's death is proven; the government can be sentenced once the non-performance of its judicial duty is proven to amount to an international delinquency, the theories on guilt or intention in criminal and civil law not being applicable here. The damage caused by the culprit is the damage caused to Janes' relatives by Janes' death; the damage caused by the government's negligence is the damage resulting from the non-punishment of the murderer. If the murderer had not committed his delinquency, if he had not slain Janes, Janes (but for other occurrences) would still be alive and earning the livelihood for his family; if the government had not committed its delinquency, if it had apprehended and punished Carbajal, Janes' family would have been spared

¹ *American Journal of International Law*, 1927, p. 362.

indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit. Even if the non-punishment were conceived as some kind of approval, which in the Commissioners' view is doubtful, still approving of a crime has never been deemed identical with being an accomplice to that crime ; and even if non-punishment of a murderer really amounted to complicity in the murder still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the government had perpetrated the killing with its own hands. The results of the old conception are unsatisfactory in two directions. If the murdered man had been poor, or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined to a small sum, though the grief and the indignity suffered may have been great. On the other hand, if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a government did *not* measure up to its international duty of providing justice, because in such a case the government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the state had succeeded in apprehending and punishing the culprit."

The Commission further pointed out that a state is never held liable for a denial of justice, either in the wider or the narrower sense of this term, for anything beyond the damage caused by its own acts or omissions. The complicity theory, they thought, introduced an anomalous and undesirable exception, to the effect that in one type of denial of justice, that of "non-punishment", a state would be liable not for what it committed or omitted itself, but for what an individual did. They anticipated, as a possible objection to their view, the argument that if in a case of non-punishment a state is not liable for the crime itself, it ought only to be held liable "in a punitive way" to a sister government, not to an individual claimant ; but the answer, they thought, was that "the indignity done the relatives of Janes by non-punishment in the present case, is, as in other cases of improper governmental action, a damage directly caused to an individual by a government. If this damage is different from the damage caused by the killing, it is quite as different from the wounding of the national honour and national feeling of the state of which the victim was a national". The computation of such damages was difficult but not more so than in many other cases of denial of justice. In the result the Commission awarded a sum of \$12,000. The American Commissioner, Mr. Nielsen, while concurring in the award, delivered a separate opinion regarding damages in which he warmly defended the older theory.

Three later decisions of the Commission seem to follow *Janes's* case, but without adding anything to the reasoning contained in

the majority opinion in that case. In *Massey's* case¹ the Commissioners were of opinion that the Mexican authorities had been guilty of gross negligence in permitting the escape of a prisoner while awaiting trial for the murder of an American citizen; they awarded \$15,000 to the United States "on behalf of" the widow and children of the murdered man, without stating however how the amount was arrived at. In *Putnam's* case,² also a case of a prisoner escaping from prison, they awarded \$6,000 with express reference to the principles laid down in *Janes's* case. In *Kennedy's* case,³ where a Mexican court imposed a sentence of two months' imprisonment for an aggravated assault which permanently disabled an American citizen, the Commission, again basing themselves on *Janes's* case, awarded \$6,000 for a denial of justice resulting from the failure to impose a penalty commensurate with the offence.

Professor Borchard,⁴ whose opinion on any point of the law of international claims must carry great weight, has given a somewhat qualified support to the reasoning of the Commission in *Janes's* case. He thinks they were right in principle in separating the individual's crime from the government's delinquency. But he suggests that :

"possibly the complete mental separation of the private and the public offence, in measuring the damages, is more fancied than real"; and that "awarding the amount of the supposed loss occasioned by the original crime has the advantage of simplicity and is supported by considerable authority. The Commission's theory is useful, however, because it is analytically correct and because it recognizes various degrees of government delinquency, from a continuous and notorious failure to punish any crime, the assumed equivalent of failure, after opportunity, to prevent, down to occasional and slight lapses, such as slowness of prosecution, inadequacy of punishment, &c. The difficulty will always remain of measuring or computing such degrees of delinquency or the 'individual grief' which they cause. That must, in any event, be arbitrary. But the inarticulate purpose of such damages, which may or may not be actually compensatory, must involve the theory that by such penalty the delinquent government will be induced to improve the administration of justice and the claimant government given some assurance that such delinquencies, to the injury of its citizens, will, if possible, be prevented in the future."

The view adopted by the majority of the Commission in *Janes's* case appears also to be recommended by the Institute of International Law in the Resolutions on the "International responsibility of states for injuries in their territory to the person

¹ *American Journal of International Law*, 1927, p. 783.

² *Ibid.*, p. 798.

³ *American Journal of International Law*, 1928, p. 174.

⁴ *American Journal of International Law*, 1927, p. 517.

or property of foreigners", adopted at the Lausanne meeting of the Institute in 1927. As regards the delinquency of "non-prevention" the Institute, like the Commission, appears to accept the traditional view: "The state is not responsible for injurious acts committed by individuals except when the injury results from the fact that it has omitted to take the measures to which under the circumstances it was proper normally to resort in order to prevent or check such actions" (Resolution III). But the delinquency of "non-punishment" is treated differently, for apparently this case is not to be regarded as another quasi-exception to the general rule of non-responsibility for the injurious acts of individuals. Resolution X says that the responsibility of a state includes "when need be, according to the circumstances and the general principles of the law of nations, a satisfaction to be given to the state which has been wronged in the person of its nationals, by way of more or less formal apologies and, in appropriate cases, punishment of the guilty, either disciplinary or otherwise"; and Resolution XI adds that "when the responsibility of the state results solely from the fact that it has not taken the required steps after the accomplishment of the injurious act, it is only bound to make reparation for the injury resulting from the total or partial omission of these measures". The Resolutions do not indicate how "the injury resulting from the total or partial omission" of measures of punishment is to be estimated, but it is a fair inference from the terminology and the context that it is at any rate not to be estimated with any special reference to the injury resulting from the act of the individual.

At first sight the new theory of the Commission, and apparently also of the Institute, is attractive. It attempts to work out the principle, about which there should be no disagreement, that a state is to be held responsible only for its *own* delinquency and the consequences that flow therefrom. And if we ask what those consequences were, for example, in *Janes's* or in *Kennedy's* case, we shall be bound to admit that no punishment of their assailants, however prompt and exemplary, would have restored Janes to life or Kennedy to health. If in spite of that we hold the state responsible for the death or the crippling, must we not admit that we are introducing an anomalous exception to the general rule?

Such a conclusion is only difficult to refute if we accept the view, which seems implicit in the reasoning of the majority in *Janes's* case, that the consequences of the state's delinquency which we must attempt to estimate are merely its consequences to

the Janes family. The opinion enumerates as items of damage the "indignant neglect" suffered by the family, and the loss of the opportunity of subjecting the murderer to a civil suit. It is true that in another passage it is said that "not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety resulting from the government's attitude", but it is difficult to see how this item of damage fits into the general argument. Janes's family can hardly suffer "mistrust and lack of safety" through the state's delinquency; we do not even know whether they were ever in Mexico so as to have these feelings on their own behalf, and they cannot have them on behalf of Janes, for he was dead when the delinquency occurred. Yet it is Janes's family who are to receive the compensation for this item, for the whole award is expressed to be "satisfaction for the personal damage caused the claimants by the non-apprehension and non-punishment of the murderer of Janes". The truth seems to be that with the possible exception of the loss of the civil remedy against the murderer (which, incidentally, if it be treated as a substantial item in the damages, would seem to justify the state being condemned to pay compensation for the actual death, since *ex hypothesi* its own wrongful omission has prevented recovery from the culprit), the only injury suffered by Janes's family is their natural indignation at the non-punishment of the murderer. We need not differ from the Commission's view that reparation for such an injury, though difficult to compute, ought in justice to be made. The real objection to their reasoning is rather that the securing of reparation for the wounded feelings of the relatives is not in fact the substantial purpose of an international claim of this kind.

When a state prefers such a claim "on behalf of" one of its nationals, against whom are we to regard the wrong for which redress is sought as having been committed? Are we to think of the complainant state as having been itself wronged "in the person of its national", or is it the national only that is wronged, and is the interposition of the state merely a procedural formality required by international law? The former is certainly the traditional theory, and even if we reject its supposed justification in the dogma that individuals cannot have rights or duties at international law, it is still possible to hold that the theory itself is sound as reflecting the essential facts of the situation in which an international claim arises. Mr. Nielsen's separate statement

emphatically asserted this traditional basis of the right of a nation to intervene to protect the interests of its nationals in foreign countries. "It seems to be clear", he said, "that the recognition of this right is fundamentally grounded on the often asserted theory that an injury to a national is an injury to the state to which the national belongs." Such a view does not, as is sometimes suggested, introduce any fiction of law; nor does it rest, as the Commission's language seems to imply, on anything so intangible as the "wounding of national honour"; rather it merely expresses the plain truth that the injurious results of a denial of justice are not, or at any rate are not necessarily, confined to the individual sufferer or his family, but include such consequences as the "mistrust and lack of safety" felt by other foreigners similarly situated. The Commission has itself recognized in another context this wider bearing of an international claim, for in a very illuminating opinion delivered on the *Calvo* clause,¹ they laid it down that the contract of an individual "cannot deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract tie in this respect the hands of his government". It is equally true that in an international claim for "non-punishment" a state has a larger interest than the mere recovery of damages for the wounded feelings of a national.

What then is the bearing of this consideration on the question of the true measure of damages in a claim against a state for having omitted to take proper steps to punish an individual wrongdoer? We need not abandon the sound principle (on which the Commission rightly insisted) that the state is only to be held responsible for the consequences of its *own* delinquency; but it is important to realize what those consequences really are. They cannot, it is submitted, be estimated with anything like the logical precision at which the Commission would seem to aim; "International tribunals", as Mr. Nielsen justly pointed out, "cannot apply rules by which to assess damages as definite as the rules by which domestic tribunals are governed in civil cases". But we introduce no fiction if we regard the state's omission as in some

¹ *North American Dredging Company of Texas v. United Mexican States. American Journal of International Law*, 1926, p. 800.

sense making it a party to the original act, and if "implied complicity" is too strong a term, "condonation", which is the word used by Mr. Nielsen, will serve; "there is no violence to logic," as he says, "and no distortion of the proper meaning of the word 'condone' in saying that a nation condones a wrong committed by individuals when it fails to take action to punish the wrongdoing." It may not be a logical necessity that a state which has "condoned" the wrongful act of an individual should be held responsible for the damage that that act may have caused, but at least it does not violate the sense of justice, and it avoids the artificiality of attempting to give different foundations, in regard to the measure of damages, to the two delinquencies of "non-prevention" and "non-punishment". For no substantial distinction exists in the injurious consequences which these two essentially similar delinquencies cause to the complainant state.

It is the natural tendency of any attempt to assimilate the rules of damages in international claims to the rules of a municipal system to take as a model the law of civil wrongs or torts. In many respects the analogy is a just one. But there are some state delinquencies giving rise to international claims which are inherently closer to the category of acts which a municipal system would classify as crimes rather than as torts; or if the analogy to crimes is resented, to wrongs for which even municipal law would admit "exemplary" or "vindictive" damages. Cases in which a state has failed to prevent or failed to punish a crime of violence in such a way as to render itself internationally delinquent emphatically fall into such a category. As the law is now administered, what Professor Borchard calls the "inarticulate purpose" of the damages in such cases is often in fact penal, and while it may not be expedient in present circumstances to make this purpose "articulate" in the theory of the law, it would be neither just nor expedient to try to exclude it. Such an attempt would either be instinctively defeated by the action of arbitral tribunals, and in that case would only introduce an unreality into the theory of the law; or it would defeat its own purpose by denying a legitimate satisfaction to complainant states, and thus discouraging the submission of claims to arbitral settlement.

THE VALUE OF THE RIGHT OF CAPTURE AT SEA IN TIME OF WAR

A Continental view and a criticism thereon.

By Vice-Admiral Sir HERBERT RICHMOND, K.C.B.

M. DUMAS, a strong opponent of the right of capture at sea in war, has recently produced two volumes (Tome I, *Les Aspects économiques du Droit de Prise avant la Guerre Mondiale*; Tome II, *Les Aspects économiques du Droit de Prise après la Guerre Mondiale*, Jacques Dumas. Société anonyme du Recueil Sirey, 1926). The first volume was ready for the press in 1914, and, with a very proper discretion, M. Dumas withheld its publication lest it should prejudice the course of events. The second volume was written after the war.

The principal interest lies necessarily in the second volume, which contains the conclusions M. Dumas draws from the experience of the war. Nevertheless, fully to acquaint oneself with M. Dumas's views, it is necessary to read with equal care the first; for the outlook and the mentality which inform the former affect the conclusions arrived at in the latter.

In his "pre-war" volume, M. Dumas made a study of the effect of capture at sea on prices, on commerce, and on the outcome of war in the past. His arguments, though presented at greater length and with a more abundant statistical and documental proof than those of the writers whose views he favours—Cobden, Maine, Danson, Lord Loreburn and others—are based upon the same fundamental line of reasoning, which may be almost summed up in three phrases—"War upon commerce cannot produce decisive results"; "Private property should be inviolate in war"; and "The greater a country's mercantile marine, the greater is that country's interest in obtaining the abolition of capture at sea".

It must be presumed that M. Dumas has read what has been written on the other side by such students of war as Mahan and Corbett; yet there is but one reference to the former's views. This is to be found in a remark, tinged with contempt, to the effect that Admiral Mahan is free to believe that it was the blockade of the South which caused the Northern victory, but the rest of the world will remain of the opinion that the fortunes of war are

decided on land ; and that Gettysburg, not the blockade, was the decisive issue. But whether the North would have been able to fight Gettysburg successfully if it had not been for the action at sea is not discussed. Further, neither Mahan's nor Corbett's views, expressed with extreme clarity in the articles on capture at sea in "Some Neglected Aspects of War", are answered.

It appears clear that it was with the conviction in his mind that the stoppage of the commerce of an enemy can produce no result on the final issue of a war, that M. Dumas proceeded to write his second volume after the war. He certainly displays some uneasiness in opening his discussion, for some of the theories he had put forward in his earlier volume had received severe shocks when tested by the fire of practical experience. "*En effet, les guerres n'éclatent pas comme un coup de foudre que personne ne peut prévoir.*" Yet the "coup de foudre" did come in August 1914, without that long period of tension which M. Dumas had forecast as inevitable. Again, the great transference of trade to neutral flags which he anticipated, was neither needed, contemplated, nor made ; nor did the right of capture turn, as he anticipated, to the profit of the neutral and the prejudice of the belligerent.

M. Dumas ended his first volume with certain confident assertions. The question of the legitimacy of capture, he averred, was no longer open to dispute. Jurists and moralists had decided long ago in the negative. This, however, is to beg the whole question. That there are both jurists and moralists who take that view is indisputable ; but there are others, jurists and moralists of at least equal weight, who differ, and who have as solid grounds for their opinions as their opponents. Commerce, as the life blood of a nation, is a means of sustaining war. The powers of a country to resist, when isolated and unable to obtain the materials necessary for the conduct of its national life, are weakened if it cannot obtain them. If war be a process of exercising pressure upon an enemy with the object of making him abandon certain claims, pretensions, or policy, then assuredly a manner of making war which directly leads to that result is as sustainable from the point of view of morality or jurisprudence as the method of slaughter of men. If a state should offend its neighbours, and go to war, are these neighbours to allow commerce to pass over the land frontiers on grounds of morality ? Such a theory never has been nor ever will be entertained by a continental nation.

Similarly M. Dumas had concluded that the theory of the utility of capture as a military measure could not be sustained.

He dismissed the influences of the operations at sea in the Napoleonic wars without discussion, though students of those wars have traced the expedition to Moscow directly to the effects of the operations at sea. He ignores Mahan's view that if Chief Justice Marshall's proposed relaxation of the rules of blockade had taken place the United States would only have retained their integrity at the cost of hundreds of thousands of lives and millions of money—and that, even so, the result would have been doubtful. A discussion which eliminates two of the most important instances can only be described as incomplete.

Then the war came ; and, after the war, M. Dumas set himself to reconsider the question in the light of the experience of the war. On the question of the military value of extinction of the enemy's commerce, he shows himself less positive than he was in 1914. Speaking of the Allies, he says, " Ils ont lutté sur mer pour réussir sur terre. Finalement vainqueurs, ils voudraient savoir, mais ne sauront jamais exactement, quelle part revient à l'action des forces navales dans le succès des forces terrestres. *La question est peut-être insoluble au point de vue militaire.*"

Yet is it insoluble ? Is it impossible to say what reactions upon the military operations followed from the so-called " Blockade " of Germany ? Can one not, to take one part of the theatre of war, note what happened in Russia in consequence of her isolation, an isolation which, though mainly one of land frontiers, was strategically analogous to a sea blockade ? The standstill to which the internal life of the Russian people was brought by the cessation of her external commerce was primarily responsible for her inability to bring her masses of man-power into play, and for that disintegration of society which precipitated the Revolution and brought about the abandonment by Russia of her allies. Was economic pressure of no influence on the military operations on land in that case ? Nor, going to the main theatre in Central Europe, is the lesson less clearly apparent. One has only to turn to the pages of the German military writers to trace with perfect clearness the hampering effects of the external influences of the sea operations. That they were long in making themselves severely felt is true, as it is true that the decision was eventually reached in the land theatre. But it is pertinent to examine the reasons for the deferment of effects. It was not that the severance of external communications is not in itself an effective means of bringing pressure upon an enemy, but that the maritime Powers had been shorn of the strength to make use of the power. The

sword had been broken by the second clause of the Treaty of Paris, and what remained had been blunted by the Declaration of London. Both of these instruments had been brought into being by people of M. Dumas's line of thought. The world is suffering to-day, as M. Dumas well points out, from the disastrous prolongation of the war. It is not too much to say that the responsibility for this suffering rests largely upon the shoulders of those who imposed limitations upon the action of maritime power, and who have exalted, in the name of morality and jurisprudence, the rights of the neutral and set his anticipated profits from trading on a higher plane than the lives of men and the prosperity of the world. It is no exaggeration to say that if maritime power had not been fettered by those agreements and by the attitude of neutral states, the Central Powers would have been unable to continue their struggle in 1916. What Mahan said about the War of Secession is equally true of the war of 1914, but with a difference. Of that war he remarked that the alternative to blockade was the expenditure of hundreds of thousands of lives and money. In the late war the limitations enforced upon economic pressure cost millions instead of hundreds of thousands of both. That cost lies at the door of those who have used the arguments so ably presented and so fully documented by M. Dumas : and the world is suffering in consequence.

M. Dumas writes movingly and with perfect justice of the need of commerce to the world. General prosperity, he truly remarks, is a result of the production of wealth. A high cost of living is a curse to all peoples. Maritime war, with what he calls the "*méconnaissance des immunités de la propriété privée*", is, he says, largely responsible for the present economic situation. So closely is his attention centred upon his favourite theme, that he treats as almost negligible the fact that this high cost of living, this impoverishment of the world, is also due to millions of men having been under arms and withdrawn from industry for over four years—eleven and a half millions in the British Empire alone, for example, being engaged in the field or the industries of supply of the fighting forces ; to millions of tons of war material for those armies having been produced and blown to atoms on the plains of Europe and the Near East ; to industrial districts having been ruined, and private dwellings in vast numbers razed to the ground. To attribute the present economic crisis of the world to the capture of shipping is to show a grave lack of proportion.

In this relation, M. Dumas resuscitates an old fiction concern-

ing "private property". On land, he remarks, private property must be respected; at sea it may be confiscated. It is indeed extraordinary that such an opinion should be held by one who has seen his own country invaded, and who himself describes at length the manner in which the invaders both of France and Italy treated the private property of the inhabitants. He tells with a wealth of corroborative detail, how the Austrians at Asiago and Gallio seized all copper, all mattresses; how elsewhere pianos, mandolines, animals, oil, wine, soap, stores—anything, in fact, from the smallest to the largest that they could carry away—were ruthlessly looted, either officially or unofficially. He describes how organized robbery began in Belgium "from the very beginning of the war"; how jewellery and money were stolen, cellars broken into, chests pillaged; and how the booty was loaded on wagons for transport to Germany. He must also surely know what happened both in the late war and in 1870 to private property in the form of railways and railway stocks in territories occupied by the enemy; and what happens to towns which stand in the way of combatants. Yet those houses and their contents are private property. France has claimed many millions of money for reparations since the war. Reparations for what? For destruction of that private property which, according to M. Dumas, must be respected in land war.

Knowing this, and knowing how the process of confiscation is conducted at sea, he feels himself able to exalt the treatment of property on land in comparison with its treatment at sea. There, he says, it is confiscated. Yet what is the analysis of this treatment? The transfer of property across the sea, in aid of the belligerent, is forbidden. The object, as Lord Stowell said in the case of the *Emanuel*, is "to inflict pressure upon the enemy and compel him to a due sense and observation of justice". That pressure is in two forms. First, goods of value to his military forces are stopped; second, the movement of enemy goods, by means of which he maintains his national industries and his credit, is prevented. Ships aiding the enemy by carrying such goods are directly assisting him to maintain his resistance, assisting to prolong the war. But instead of being seized by the individual captor and disposed of at his will, the property in those ships is adjudged by law, and before the ships can be condemned, the service on which they were engaged, and the nature of the property are inquired into, with counsel to defend the accused, before the judicial tribunal of the Prize Court, which administers the Law of

Nations. That organized robbery which happens on land cannot happen at sea.

M. Dumas appears to believe that the extension of warlike action to economic life is a modern innovation, resulting from the "extraordinary economic development of the civilized world" which, he says, has made people consider that war could not be limited to a military struggle, but to attain its end must also become commercial. So far from this being a modern belief, it is one of the oldest. The aim of a maritime Power, and very particularly of the allies of a maritime Power, has always been to bring pressure upon an enemy through the medium of his external commerce. He also speaks as though the economic effort was something wholly distinct from the military and assumes that the aim of England was the impoverishment of Germany. He appears wholly to fail to appreciate that impoverishment of a commercial rival had nothing whatever to do with the policy of capture at sea. It is true that a foolish cry was raised in the early days of the war, by wholly irresponsible people, that the opportunity had now come to destroy a dangerous commercial rivalry. But such an idea had no place in the councils of the nation. It was a process of investment, analogous precisely to that process of siege by which a town or a province, in land warfare, may be forced to surrender.

So absorbed is M. Dumas in his determination to prove that sea warfare of this nature is the source of every ill, that he claims that a reaction of the right of capture was the pillage of the occupied provinces; and this although he has said that this pillage began from the outbreak of the war and before any "blockade" or form of blockade had made its appearance. Unable wholly to sustain this theory, he falls back for support upon the assumption that the imposition of blockade (using the term in its general and non-legal sense) was injurious to France, Belgium, and Serbia, because it furnished the enemy with a pretext for further spoliation. It is true that M. Dumas discounts this German plea for seizing, in the occupied provinces, what they could not get by sea. But he nevertheless uses the argument to support his theories. Indeed he leaves us in doubt of what he really believes in this matter, for, while blaming capture at sea for the injury suffered in France and Belgium from this spoliation, he contradicts his own theory in remarking that "it is perfectly clear that, even if their coasts had suffered no blockade, even if the right of capture had never been practised, even if England had not entered the war, the Germans would have effected a complete spoliation". How then,

if this inevitably would have occurred, can the right of capture be held to blame for the cruel sufferings in France, in Belgium, and in Serbia which we all deplore ?

There is indeed something pathetic in M. Dumas's resolution to make every factor bend to the proof of his particular beliefs ; as, for instance, when he remarks that if the invaded provinces had been larger, the Germans might have lived in them indefinitely, however closed might have been the sea. But if we are to base our conclusions upon imaginary or hypothetical extensions of territory, we may carry our calculations to almost any length in the world of might-have-beens. We might indeed argue that if the French war plans for the military campaign had been on different lines, those provinces would not have been occupied at all.

France, Belgium, and Serbia would, says M. Dumas, have been better served if England had come to their help with an arm more rapid in its effect than the right of capture. It is possible that if England had been what she is not and has neither intention nor power of becoming, a military Power, this might have been done ; though for her to have been able at the same time to maintain a navy sufficient to protect herself against invasion and defend the line of passage of her troops to France, would have wholly crippled her resources in peace. But nations are not knight-errants—be it England, France, or any other. Each maintains such forces as her national requirements for defence demand ; and England, no more than any other country, is to be expected to maintain a large army or air force which she does not need in her own defence, at the cost of a navy which she does need and without which she cannot defend her territories and her interests, and incidentally, without which she cannot help her allies on land.

Moreover, it is to be recollected that even though the right of capture should be abjured, there must be some security that the agreement will be observed in war. Agreements were made in plenty at The Hague. There were to be no bombardments of unfortified towns ; hospital ships were to be immune ; mines were not to be laid except under specified conditions ; vessels were to be visited before capture, and so forth. Without wishing to sustain the theory, too commonly assumed in relation to agreements, that on the stress of war all will disappear, one may well ask what guarantee England would have for the security of her life-blood, commerce ? The instructions of the American State Department to its delegates at The Hague contained the following sentence : “ con-

sidering the temptation to which men and nations may be exposed in a time of conflict, it is doubtful if an international agreement to this end would prove effective." "This end" was restriction upon the use of gas. But what is true of one agreement is true of another; and it is at least prudent to consider how tempting a target, to a hard-pressed enemy, would be an Empire like the British, with a great and unprotected commerce upon which it was wholly dependent for its life. The instrument for the defence of commerce, a sufficient navy, cannot be created in a month, or a year; and a Britain, which had acted upon M. Dumas's advice, and made consequential reductions in her naval strength, would be as much at the mercy of an enemy as a hermit crab without a shell. Could she depend upon the neutral Powers to protect her? The recent history of Europe lends no countenance to such an assumption. Violations of agreements, solemnly entered into, began in August 1914; and continued without the active intervention of any of the signatory neutrals, except Britain.

One appreciable difficulty arises in considering M. Dumas's book. Although he continually interjects arguments to show that capture at sea is militarily of no value and uses them to strengthen his case, he cannot bring himself to come to the same conclusion in his second volume that he did in the first. "Realistic examination of facts discloses that it is upon land that the final result was obtained, and in spite of certain contrary appearances, it is difficult to know whether the attainment of this final result was furthered or retarded by the war against commerce." The action against commerce, he says, deflected so many material resources and human forces from the central point of action to what he calls secondary ends. This assumes the truth of two premises. First, that all these resources could have been available, but for Britain's "tradition obstinée", for service in the military theatre. Some could have been—in time. But naval force must have been maintained for defence of the country, and for protection for the movements of troops. The assumption that if there had been no British effort against commerce, the naval force employed by Britain and her allies would have been available on land is thus wholly incorrect.

The second is the assumption that these naval forces were employed for "secondary purposes"; "*vers des buts secondaires*". The end—bringing pressure on the enemy—was not secondary. It was a primary action in itself.

As in his previous volume, M. Dumas questions whether such

a form of warfare is legitimate from the moral point of view. He puts, with perfect fairness, the arguments of those who believe it to be so ; but he makes no attempt to answer those arguments. And it is here that one is tempted to ask why, if the moral point of view and the military are, as he says, outside the scope of his study, he should have devoted so much attention to either of them. “ Le point de vue moral de la question, comme le point de vue militaire, *restent pourtant en dehors de cette étude*. La seule question posée par nous est et demeure celle-ci : le droit de prise a-t-il eu des avantages décisifs au point de vue économique ? ” This, however, is not the true question ; the struggle at sea was not for the purposes of economic superiority. Its end was throughout military. M. Dumas will persist in his view that some ulterior object of crushing an economic competitor, crushing Germany as a trader, lay behind the British warfare. It did not. Nor is it correct to say that commerce warfare aims only at the reduction of the enemy by famine. The circumstances under which food stuffs became liable to capture are familiar and need not be recounted here. “ Publicists and politicians, staffs and Admiralties, will long continue to discuss the advantages and disadvantages of the right of capture. But the economists have their position clear. They will always condemn the war against commerce.” That war upon commerce causes great disturbances and injury to the standard of living is indisputable ; but such disturbances and injury are not solely the resultants of this form of the use of force ; they are the concomitants of war itself, which diverts the activities of millions of people from the production of useful goods for exchange to the production of goods for slaughter. If war against commerce had merely as its object economic injury to an enemy, and had no relation to compelling an enemy to compliance, either directly or in association with military operations, the condemnation of the economists would be justified ; and that condemnation applies to war in any form. But that is not the object. Therein lies one of the principal reasons for dissenting from the conclusions arrived at by M. Dumas in his able argumentation.

WHEN DO BRITISH TREATIES INVOLVE LEGISLATION ?

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INTRODUCTORY.

A NOTE upon this subject by way of supplement to the text-books may be of interest to some readers, both British and foreign, though much of the ground covered by it is very familiar.

Anson, writing in 1908, tells us that : ¹

“ where a treaty involves a charge upon the people, or a change in the general law of the land, it may be made, but cannot be carried into effect without the consent of Parliament ”;

and also that ²

“ apart from precedents relating to Indian territory, it has of recent years been thought desirable, if not necessary, that the consent of Parliament should be given to the cession of territory in time of peace. Cessions made at the conclusion of peace or in course of a war, or of lands acquired by conquest or cession, for which Parliament has not legislated, and for which the King has not by his own act deprived himself of the power of legislating by Order in Council, would seem to stand on a different footing.”

In Halsbury's *Laws of England* ³ the authors of the title on “ Constitutional Law ” (Professor Holdsworth and others) mention treaties which render necessary taxation or a grant from the public funds, or affect the existing laws of trade and navigation or the private rights of the subject, as requiring Parliamentary sanction, and state that in the case of treaties involving an important cession of territory it is “ deemed safer ” to obtain that sanction ; but that in the case of treaties “ made to put an end to a war or, possibly, to prevent war, . . . it is doubtful whether the sanction of Parliament would be always required ”.

It will be convenient to examine some precedents illustrating these and other rules.

TREATIES INVOLVING A CHANGE IN THE LAW.

When a treaty involves for its enforcement in England any change in the law administered by any English court of law (other than the law affecting the belligerent rights of the Crown, which demands separate treatment), it is necessary in order to give effect

¹ *Law and Custom of the Constitution* (3rd ed.), Vol. II (The Crown) ; Part II (1908), at p. 109.

² *Ibid.*, at p. 107.

³ Vol. VI (1909), § 679.

to the treaty that Parliament should enact such legislation as may be required to make that change in the law. This principle has been illustrated by numerous decisions.

(i) *Extradition*. It lies at the root of our law relating to extradition. The common law¹ prevents the Crown from surrendering to another state fugitive criminals who have committed crimes abroad and escaped to Great Britain, and this common law right is enforceable by writ of *habeas corpus*. Therefore, if the Crown wishes to bind itself by treaty to extradite fugitive criminals, it must secure the necessary legislation by Parliament, and any attempt at extradition which ^{does not} falls within the scope of a treaty and of the Extradition Acts, 1870 to 1906, can be defeated by writ of *habeas corpus*. And it should be noted that this remedy is open both to the British subject and to the alien.

(ii) *The grant of the privileges of extritoriality*. An attempt by the Crown to grant to a foreign Sovereign on behalf of his ships immunity from civil jurisdiction was the occasion of a clear statement by Sir Robert Phillimore, as Judge of the Probate, Divorce and Admiralty Division, of the principle under discussion. The Crown by a Postal Convention with the King of the Belgians (which had not been accompanied by British legislation) had agreed that the latter's mail-boats should be "considered and treated" in British ports "as vessels of war and be there entitled to all the honours and privileges which the interests and importance of the service . . . demand". Upon the Crown's opposition to a motion for the arrest of one of these mail-boats, the *Parlement Belge*, in a suit for damage done by collision to a British ship, Sir Robert Phillimore in a classical passage² declined to prevent the

¹ See Clarke : *Law of Extradition* (4th ed., 1903), who cites (pp. 126, 127) the case of the Spanish convicts wrecked on the Bahama Islands in 1836 in regard to whom the Crown was advised by the Law Officers that it had no right to detain or *a fortiori* to surrender them (see Forsyth : *Cases and Opinions on Constitutional Law* (1869), pp. 341, 342, and also the case of American brig *Creole* in 1841 whose cargo of negro slaves rose, murdered a passenger, and wounded the captain and the mate, but the British authorities at Nassau upon the instructions of the British Government at home declined to surrender the mutineers to the American Government ; see Dana's Wheaton, note 62, p. 165).

² (1879) 4 P.D. at p. 154. "If the Crown had power without the authority of Parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for against her as a wrong-doer on account of the collision cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished. This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution. Let me consider to what consequences it leads. If the Crown without the authority of Parliament, may by process of diplomacy shelter a foreigner from the action of one of

issue of the warrant of arrest. The Court of Appeal ¹ reversed his decision on another ground by holding that the privilege of immunity from arrest was not confined to ships of war and extended to all public property of the foreign service "destined for public use", and expressed no opinion upon Sir Robert Phillimore's judgment on the treaty point; but it has since been regarded as the authoritative statement of the principle.

But there is some reason to doubt whether the limit thus set upon the power of the Crown is as definite as has been commonly supposed. By a Trade Agreement ² made between the British Government and the Russian Soviet Government on March 16, 1921 (which was not accompanied by British legislation), the British Government agreed, *inter alia*, to grant to Russian official agents in Great Britain the same exemption from taxation, central and local, as is enjoyed by "the official representatives of other foreign governments", and also "immunity from arrest and search". No legal difficulty would arise as to taxation *stricto sensu*, that is, payable to the Crown, because the Crown can give the necessary instructions to its own officials, though obviously any exemption accorded to one person increases the burden upon the rest of the community. But difficulty might arise under such an agreement if a local authority sought to defy the Crown and enforce payment of rates by a Russian official agent. Such a claim would not be enforceable against a diplomatic agent, ³ but on what ground could a judge decline to permit its enforcement against a non-diplomatic person? That is, however, mere speculation, and we are not aware of any decision being given upon this clause of the Trade Agreement. But in *Fenton Textile Association v. Krassin* ⁴ the Court of Appeal had to con-

Her Majesty's subjects who has suffered injury at his hands, I do not see why it might not also give a like privilege of immunity to a number of foreign merchant vessels or to a number of foreign individuals. The law of this country has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors; but I do not think that it has therefore given the Crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons, who are not really ambassadors."

¹ (1880) 5 P.D. 197.

² Cmd. 1207 of 1921.

³ *Parkinson v. Potter* (1885) 16 Q.B.D. 152; *Macartney v. Garbutt* (1890) 24 Q.B.D. 368.

⁴ (1922) 38 T.L.R. 259. Further, if the decision of the Court of Appeal in *Musman v. Engelke* (1928) 1 K.B. 90, were reversed by the House of Lords, before whom it will shortly come, it would be possible for the Crown, after having agreed by treaty to confer diplomatic immunity upon a non-diplomatic person (there was no treaty in this case), to give effect to the treaty by recognizing him as a member of a diplomatic staff

sider whether M. Krassin, a Russian official agent appointed under the Trade Agreement, was entitled to immunity from civil process or not, and held that neither under that Agreement nor apart from it could he claim this immunity; but the Agreement was discussed on the assumption that it bound the Court, and Atkin L.J. (at p. 262) saw "no reason why sovereign states should not come to an agreement as to the rights and duties of their respective envoys, ordinary or extraordinary, and why such agreements should not enlarge or restrict the immunities which otherwise would be due under the well-established usage of nations".

(iii) *General*. All the Treaties of Peace which concluded the late war received legislative sanction. This was necessary in order (*inter alia*) to enable the Crown by means of Orders in Council having the effect of statute to give effect to their provisions, and particularly those concerning contracts and other transactions between British and enemy subjects, which would otherwise have been enforceable in the courts of law upon the restoration of peace instead of being remitted to the Clearing Offices and the Mixed Arbitral Tribunals. The statutes are the Treaty of Peace Act, 1919 (as to Germany); the Treaties of Peace (Austria and Bulgaria) Act, 1920; the Treaty of Peace (Hungary) Act, 1921; the Treaty of Peace (Turkey) Act, 1924; all of them being described as Acts "to carry into effect" the particular treaty in question. It will be remembered that all the Peace Treaties except that with Turkey embody the Covenant of the League of Nations. Supposing that circumstances arose in which Great Britain became bound under Article 16 of the Covenant to enforce an economic boycott and blockade against a covenant-breaking state, could the British Government by Orders in Council issued under the above-named Acts and having thereby the force of statute effectively compel persons within British jurisdiction to observe the boycott and blockade? Without some such change in municipal law it is difficult to see how Great Britain could enforce the boycott and blockade without declaring war against the Covenant-breaker and thereby automatically bringing into operation the laws against trading with the enemy.

As instances of recent legislation for the purpose of giving effect to treaties we may mention the Arbitration Clauses (Protocol) Act, 1924, the Former Enemy Aliens (Disabilities Removal) Act, 1925.

upon his name being submitted to the Foreign Office for that purpose and to protect him from civil or criminal proceedings by means of a statement made to the Court through the mouth of one of the Law Officers.

Anson's rule above-mentioned, that a treaty which "involves a charge upon the people . . . cannot be carried into effect without the consent of Parliament", finds recent illustration in the Trade Facilities and Loans Guarantee Act, 1922 (Section 2), which authorized the Treasury, in pursuance of a certain Protocol signed at Geneva, to guarantee a proportion of the Austrian Reconstruction Loan.

TREATIES INVOLVING CESSIONS OF TERRITORY.

A treaty which cedes British territory to a foreign state has a very definite effect upon the rights of British subjects, and indeed its normal effect, apart from any provision to the contrary, is to denationalize them and convert them into subjects of the transferee state. One would expect therefore to find that such treaties required legislation. As a matter of strict law this does not appear to be the case; as a matter of constitutional convention a series of modern precedents makes it extremely unlikely that in future any cession will take place without statutory authority. Instances of legislation for this purpose are the Anglo-German Agreement Act, 1890 (passed in spite of Mr. Gladstone's protest against Parliament being invited to share with the Government the responsibility for the cession of Heligoland to Germany),¹ where the treaty of cession was made subject to the assent of the British Parliament; the Anglo-French Convention Act, 1904, where the treaty between Great Britain and France involving the cession of certain territory to France was made "subject to the approval of their respective Parliaments"; and the Anglo-Italian (East African Territories) Act, 1925, which involved the cession to Italy of certain African territory which was apparently partly British and partly territory belonging to the Sultan of Zanzibar under British protection. But when in 1923 a portion of Ruanda in East Africa was transferred from the British mandate to that of Belgium at the instance of the Council of the League of Nations,² no statute was considered to be necessary because, of course, the territory did not form part of the King's dominions.

TREATIES REGULATING BELLIGERENT ACTION.

The combined effect of International Law and British Constitutional Law arms the Crown upon the outbreak of war with certain belligerent rights. Numerous treaties have been entered into by His Majesty by which he has undertaken in the event of

¹ Anson, *op. cit.*, p. 106.

² *League of Nations Official Journal*, November 1923, p. 1273.

war to regulate his conduct as a belligerent. Upon this state of affairs the following proposition of law is clear ; namely that, at any rate in so far as such a treaty brings about a mitigation of belligerent rights, the treaty will be enforced by British courts irrespective of any statutory sanction. Let us examine the attitude of British courts towards some treaties of this character.

(i) *The Declaration of Paris, 1856*. By this treaty, which has never been approved by or embodied in a British statute, the Crown surrendered its ancient claim to capture neutral goods found upon enemy ships. During the late war the Declaration was repeatedly applied by the Prize Court ¹ and its validity, in spite of the absence of statutory authority, was never questioned.

(ii) *The Hague Conventions of 1899 and 1907*. Here again we find numerous cases in which both neutrals and enemies were allowed to claim the benefit of these treaties made by the Crown and not approved by or embodied in an Act of Parliament ; for instance, Hague Convention VI of 1907 "relative to the status of enemy merchant-ships at the outbreak of hostilities",² or Hague Convention X of 1907 as to the exemption of hospital ships from capture.³

The principle that treaties such as the Declaration of Paris and the Hague Conventions are binding upon a Prize Court without statutory authority was accepted without question and without reason given. One may conjecture that the true reason is that given by the court in *The Zamora* ⁴ in indicating what kind of Orders in Council a Prize Court should regard as binding upon it though changing the law that would otherwise be applied by it, namely, that "it will act on" Orders in Council "in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be".⁵ War is

¹ For instance, *The Marie Glaeser* (1914) P. 218 ; 1 B. & C.P.C. 38, where the claimant would have received the benefit of it if he could have brought his claim within it ; *The Miramichi* (1915) P. 71 ; 1 B. & C.P.C. 137, where again it was found to be irrelevant but was discussed on the assumption that it bound the court ; *The Hakan* (1918) A.C. 148 ; 2 B. & C.P.C. 479 ; *The Dirigo, The Hallingdal and other Ships* (1919) P. 204 ; 3 B. & C.P.C. 439, where enemy claimants were allowed to claim the benefit of Article 2 of the Declaration protecting enemy non-contraband goods upon a neutral ship.

² *The Chile* (1914) P. 212 ; 1 B. & C.P.C. 1 ; *The Marie Glaeser*, *supra*.

³ *The Ophelia* (1916) 2 A.C. 206 ; 2 B. & C.P.C. 150.

⁴ (1916) 2 A.C. 77 ; 2 B. & C.P.C. 1.

⁵ (1916) 2 A.C. at p. 97 ; 2 B. & C.P.C. at p. 17. It is believed that the Declaration of London of 1909, had it been ratified, would have been applied by the Prize Court without requiring Parliamentary sanction. On the other hand, Hague Convention XII of 1907 for the Establishment of an International Prize Court was considered to

waged by the Crown in virtue of its prerogative, and if the Crown chooses to waive any of its rights, either by antecedent treaty or *proprio motu*, it is not for the Prize Court to be *plus royaliste que le roi* and to insist upon enforcing them.

But there is one case which cannot be disposed of in this way and which, it must be confessed, causes some heart-searching. Amongst the many points argued before a full Court of Appeal and reported under the title of *Porter v. Freudenberg*¹ was the question whether Article 23 (h) of chapter 1 of section 2 of the Hague "Regulations respecting the Laws and Customs of War on Land" abrogated the old common law rule that an alien enemy (in the territorial sense of the term, that is, a person voluntarily resident or carrying on business in enemy territory) cannot sue in the King's courts in time of war. For perfectly manifest reasons, which had been set forth in a published letter addressed by the Foreign Office to Professor Oppenheim on March 27, 1911, the Court of Appeal held that Article 23 (h) had nothing to do with the common law rule mentioned above, which therefore retained all its force and operation, but was intended to forbid "a declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights".²—a meaning which the context of Article 23 (h) makes abundantly clear. Our point of interest lies here. The matter was argued on the assumption that the Hague Regulations referred to bound the court in spite of the absence of statutory enactment, and therefore, if the court had pronounced in favour of the meaning contended for, alien enemies in the territorial sense would have been allowed to sue in the King's courts in time of war, and an ancient rule of the common law would have been abrogated by a prerogative act without any statutory sanction. That is a more serious thing than a modification of prize law of the kind discussed above. It is nowhere objected in *Porter v. Freudenberg* that the Hague Regulations had never received statutory sanction.

Another example of a treaty which provides for a state of war is that of the Washington "Submarines and Gas" treaty of 1922, which was made, *inter alia*, in order "to protect neutrals and require legislation, on the ground, it is understood, that it provided for an appeal from the British Prize Court to the proposed International Prize Court (see section 25 of the Naval Prize Bill of 1911, printed in appendix to Oppenheim, *International Law*, Vol. I (2nd ed., 1912), pp. 683–9, which failed to become a statute).

¹ (1915) 1 K.B. 857.

² (1915) 1 K.B. at p. 878.

non-combatants at sea in time of war", the parties being the United States of America, the British Empire, France, Italy, and Japan. It contains a short code of regulations for the conduct of operations against merchant vessels by belligerent vessels, including submarines, and makes violations of these rules, whether or not committed "under orders of a governmental superior", equivalent to the crime of piracy and punishable by the civil or military authorities of any state. It was accordingly necessary to change the criminal law of Great Britain and the Crown Colonies to enable a court to treat a violation of the treaty as an act of piracy, and this was done by Section 4 of the Treaties of Washington Act, 1922. This treaty, the operation of which was made dependent upon the deposit of all the ratifications, has not yet come into force.

What then is the effect of the statute? There seems to be no doubt that a definite change in our criminal law has been made, and that a British court would, municipally, be justified in punishing, if not bound to punish, such violations as acts of piracy, while leaving it to the Executive to take such action by way of remission of the punishment as might be required to avoid the commission of an international delinquency.¹

MISCELLANEOUS.

In view of the changing status of the Self-Governing Dominions the following instances of legislation approving agreements made between Great Britain and Dominions may be mentioned: the Nauru Island Agreement Act, 1920, which confirms the agreement regarding the mandate over that island made between "His Majesty's Government in London" and the Australian and New Zealand Governments, the agreement providing that it should come into force on its "ratification" by the Parliaments of the three countries (an unusual use of the word "ratification"); the Irish Free State (Agreement) Act, 1922, which gave "the force of law" to certain "Articles of Agreement for a Treaty between Great Britain and Ireland" signed "on behalf of the British Delegation" and "the Irish Delegation" respectively²; the

¹ As in *Mortensen v. Peters* (1906) 14 Sc.L.T. 227. Similarly, the Geneva Convention Act, 1911, was necessary to ensure the punishment of persons who illegally made use of the emblem or name of "Red Cross" or "Geneva Cross" contrary to the Second Geneva Convention of 1906, the Act being described as "an Act to make such amendments in the law as are necessary to enable certain reserved provisions of the Second Geneva Convention to be carried into effect".

² This is not an agreement between Great Britain and a Dominion, because at the date of the Agreement the Dominion known as the Irish Free State was not in existence.

Irish Free State (Confirmation of Agreement) Act, 1924, and the Ireland (Confirmation of Agreement) Act, 1925.

FORM OF APPROVAL BY PARLIAMENT.

When a treaty is of such a kind that for one of the reasons already illustrated it requires, as a matter of law or convention or policy, Parliamentary sanction, that sanction may take one of two forms: (1) *mere approval*, usually in the form of a statute, or (2) *legislation changing the law*. (1) The first is illustrated by the Anglo-French treaty of June 28, 1919, for "Assistance to France in the event of Unprovoked Aggression by Germany", which itself provided that it should be "submitted to Parliament for approval" before ratification by His Majesty, and to which Parliament gave its approval by the Anglo-French Treaty (Defence of France) Act, 1919, though probably resolutions passed by both Houses would have been adequate for the purpose.¹ It will be noted that this treaty, which made no change in the law and laid no direct financial burden upon the subject, only required Parliamentary approval as the result of an express stipulation to that effect. (2) The second form of approval has been illustrated by a number of statutes already mentioned which were actually necessary to carry treaties into effect either by changing the law or by empowering the Crown to do so by means of Orders in Council having the effect of statute.

SUMMARY.

We may conclude by suggesting the following summary of the present state of British constitutional law and practice.

(1) Treaties which for their enforcement by British courts of law require some addition to or alteration of the existing law cannot be carried into effect without legislation. Therefore the King will not be advised to ratify them unless and until such legislation has been passed or Parliament has given the necessary assurance that it will be passed.² A treaty imposing on Great Britain the registration of the "treaty" with the League of Nations Secretariat, and the protest of Great Britain, see *League of Nations Treaty Series*, Vol. XXVI, p. 9, and Vol. XXVII, pp. 449-50.

¹ This treaty never came into force owing to the failure of the United States of America to ratify the parallel treaty.

² A recent Advisory Opinion of the Permanent Court of International Justice, upon the rights of the officials of the Polish Railway Service (Publications of the Court, Series B, No. 15), contains some interesting observations upon the circumstances in which a treaty can, if such is the intention of the parties, confer rights and impose duties directly upon individuals enforceable in national courts without the necessity of municipal legislation adopting the treaty.

Britain a liability to pay money either actually (for instance, to make a loan) or contingently (for instance, to guarantee a loan) usually falls within this category, because as a rule the money could not be raised or expended without legislation.

(2) Treaties which modify the belligerent rights of the Crown when engaged in maritime warfare will receive effect in British Prize Courts without legislation.

(3) Treaties made expressly subject to the approval of Parliament require its approval, which is usually given in the form of a statute.

(4) Apart from the Indian Empire, which stands on a special footing, it is the practice, amounting probably by this time to a binding constitutional convention, for treaties involving the cession of British territory to require the approval of Parliament given by a statute.

NEUTRAL COMMERCE IN THE WAR OF THE SPANISH SUCCESSION AND THE TREATY OF UTRECHT.

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HISTORY ought to be continuous. Although it is natural to pass more rapidly over the comparatively uneventful periods and to pay more heed to those which are decisive, the neglect of the duller stretches often makes it impossible to understand the others. This is the reason for the present summary account of what may well seem an unimportant matter.

Much has been written about the treatment of neutral commerce in the war between William III and Louis XIV (1689-96), and much about the clauses relating to it in the Treaty of Utrecht and about its actual treatment in the later wars of the eighteenth century ; but the intermediate period of the war of the Spanish Succession (1702-13) has been, in this matter, left in obscurity which, though not undeserved, is still inconvenient. To some extent this is due to chance. Early writers on international law did not as a rule pay much attention to the events of their own times ; but some of them give valuable information on such topics. It so happened that no work of great importance in the history of international law was written during that war, and little or no attention is paid to the events of the war in those of the first rank written within a generation of the time.¹ Even the famous Dutch jurist Bynkershoek let the subject alone, though he published a book on the sovereignty of the sea in the first year of the war and was again to write on international law in his old age. Enlightenment which in respect of other wars may easily be got from legal authors must as to this be drawn from scattered documentary sources.

There is one episode of the war which forms an exception to this, the episode of the Swedish blockade in the Baltic. The state of Europe at this time was unique in modern history, in that there were two great wars in progress side by side and each completed its course independently without involving any of its belligerent Powers in the other. In the southern and western

¹ See Reddie, *Researches in Maritime International Law*, pp. 205 ff. and the works there cited.

portions of Europe and overseas in America and the Indies, the French and Spaniards confronted a coalition in which the English and the Dutch were the predominant naval Powers. In the Baltic lands the great northern war was dragging on its course, a series of campaigns in which allies came and went, but in which the one unvarying element was the fact that Charles XII of Sweden was at war with one or more of his neighbours continuously from 1699 until his death, years after the war of the Spanish Succession had ended. More than once the two wars very nearly became one general conflict, but, by luck and management, they were kept apart. Even the fact that both the Danes and the Swedes had possessions in the Holy Roman Empire and that the Empire was a belligerent against France did not lead to a fusion of the two wars. Charles XII rejected the convention by which these possessions were allowed to remain neutral in the northern war,¹ but he and the King of Denmark remained neutral in the other.

For maritime trade this separation of the two wars had the comic effect that the Powers which were neutrals in one were belligerents in the other, so that the arguments used to justify their rights in relation to seaborne trade had to be framed to meet the unusual condition that those to whom they were addressed would be able to turn them against their authors in the simultaneous controversy in which the rôles of belligerent and neutral were reversed. Charles XII of Sweden began, as a belligerent, to interfere with the Baltic trade of the English and Dutch, the "maritime Powers" *par excellence* in 1704, "for no better reason", as the British envoy wrote from Copenhagen, "than what we have every day for bringing up the Swedes' ships trading to France".² So long, however, as their own war lasted, the sea Powers in their capacity of neutrals had strong reasons for not pressing this quarrel to an extremity, and although their complaints ran in *crescendo* from 1710 onwards, the quarrel did not come to a head until the reign of George I of England. Its political history has been thoroughly explored by Mr. J. F. Chance.³ An earlier writer who dealt with it from a legal point of view was Sir Christopher Robinson. His opinion is that "as far as we can judge of that dispute, at this time, the Powers of Great

¹ Convention of March 31, 1710, in Lamberty, *Mémoires pour servir à l'histoire du 18^e siècle*, Vol. VI, pp. 292-5; see also *ibid.*, Vol. VI, pp. 317-18.

² Vernon to Harley, November 14/24, 1704, in *Hist. MSS. Comm., Portland Papers*, IX, 170.

³ *George I and the Great Northern War*, especially Chap. III.

Britain and Holland appear to have been in the wrong"; but from the documents which he used he was unable to decide whether it was meant to contend that the Swedish blockade was illegal because it was not directed to operate as a military investment of the ports, or because it was not actually kept up by a naval force.¹ This doubt seems to be settled by a document recently edited by Mr. Chance. Secretary St. John wrote on July 27, 1711, to the British Minister accredited to Charles XII: "If those towns were actually besieged, or blockaded, it would be allowed to be a just reason for prohibiting a trade with them, but the case is not the same in respect to a few ships of warr ordered to cruize before the ports."² This would appear to show that the British case rested on an argument which could not at that time be turned against themselves, so that Robinson's judgment seems to be too severe.

The reluctance of the sea Powers to resort to reprisals by confiscating Swedish ships, or even to provide armed convoys for their Baltic shipping, in spite of the pressure put upon them to do so,³ was largely due to their need of naval stores, for which the forests and plains of the Baltic were the accustomed source of supply. The Swedes were determined to do this trade on their own terms, that is to say, as far as possible in their own bottoms, at their own price, in limited quantities, and through their own factors. To escape these inconveniences the English exerted themselves to develop an alternative source of supply which had been tried unsuccessfully in the previous war, that of their North American plantations. This time, especially after 1704, the results were good: pitch, tar, turpentine, and timber began to come across the Atlantic in gratifying quantities.⁴ But the dependence on the Baltic lands was not ended. The Dutch and English needed the naval stores which came thence in their own and in Swedish and Danish ships, and the counterpart of this need was the desire to prevent the carriage of naval stores to France.

The only other material point about neutral trade which the

¹ *Collectanea Maritima*, pp. 162 ff. Robinson used the documents in Lamberty; but his foot-notes do not refer to all the relevant documents in that collection.

² *British Diplomatic Instructions* (Royal Hist. Soc.), I, 52; see also *ibid.*, I, 46, 49, 52-6, 64-5.

³ For instances of this see the opinion of the Deputy Governor of the Eastland Company, November 19, 1713, in *Law and Custom of the Sea*, ed. Marsden (Navy Records Soc.), II, 235, and *Recueil van Zeezaken* (1721), III, 655, 675, 696, 705, 708.

⁴ See the Acts of Parliament 3 and 4 Anne, c. 9, s. 1; 8 Anne, c. 14; 9 Anne, c. 22; 12 Anne, c. 9; Anderson, *Origin of Commerce*, III, 16; *Cal. of State Papers, Domestic*, 1703-4, *passim*; *House of Lords Papers*, New series, VI, 93-5; VII, 303 ff.

sea Powers had to watch at the beginning of the war was the danger that the neutral flag might in one way or another enable their own subjects or allies to carry on an illegal trade with the enemy. Both these points were covered by treaties. The Danes, in a series of engagements made in 1701, prolonged for ten years and improved in some respects the system which had been settled for the previous war by the treaties of 1690 and 1696. By these agreements contraband was defined so as to include all naval stores. Except for contraband the Danes were to have freedom to trade with France; but they renounced their rights to trade between one French port and another, and in order to prevent foreigners from committing frauds the convention of 1690 relating to passports was to come into force provisionally, pending its immediate revision by the parties.¹ The French regarded this treaty as a departure from the duties of the Danes as neutrals, and gave orders for the arrest of Danish ships on their way from Denmark or Norway to enemy ports.² The arrangements for Swedish trade were less restrictive: they rested on the commercial treaty of 1661 between England and Sweden, which did not include ship-building materials in the enumeration of contraband. At the outbreak of war the British Government seem not to have been satisfied that these treaties, though they embodied the system used in the later years of the previous war, would be adequate;³ but they were not modified by further treaties. Such disputes as there were between the neutrals and the sea Powers arose from differences about their enforcement, not from any disagreement on their principles.

At first the English treated the neutrals very mildly; their men-of-war and privateers searched and brought in neutral merchantmen bound to France with goods of the growth of their own countries, but they did not bring in such ships if returning from France with products of that country. It was not until August, 1703, that they were ordered to search vessels of the latter class and to bring them in if they were not furnished with passes, certificates, and papers in accordance with the treaties.⁴ The reason for this increase of severity was the coming into operation of a tripartite treaty by which the English, the Dutch

¹ *Secr. Res. Holland*, June 30, 1701, Du Mont, *Corps diplomatique*, supplément, III, ii, 7. The treaty was renewed in 1711.

² Edict of January 12/23, 1704, in *Nouveau Code des Prises*, ed. Lebeau, I, 281-2.

³ Vernon to Robinson, Feb. 24, 1701-2, in *British Diplomatic Instructions*, I, 25-6.

⁴ Hedges to Prince George of Denmark's Council, *Cal. of State Papers, Domestic*, 1703-4, p. 87.

and the Emperor agreed to prohibit for one year all trade of their respective subjects with France. The inducements to fraudulent trading under a neutral flag were increased by this prohibition, and its enforcement naturally led to a number of arrests and confiscations of Danish and Swedish ships for offences against it. The English showed themselves conciliatory, and the prohibition not being renewed on its expiry at the end of a year, fresh instructions were issued to the fleet explicitly allowing all trade which was not contrary to the treaties.¹

This did not end the friction with the neutrals. The Danes, for instance, complained of the intolerable expenses incurred by ships brought up for examination, whether guilty or not. Even when they were proved to be innocent, the Court of Admiralty seldom or never ordered their costs to be paid by the privateers which brought them in, so that there was nothing to deter privateers from recklessly arresting ships on suspicion. In the spring of 1705 the Danish College of Commerce had already a claim for damages amounting to 200,000 crowns or nearly £50,000 sterling.² The English, however, throughout the war were fortunate enough not to have any really serious dispute with the neutrals. Even the convoying of neutral merchant fleets did not cause the trouble that might have been expected. The neutrals held that ships under convoy were, like public ships, exempt from search; but this pretension does not seem to have been pressed. Swedish and Danish ships were often brought in by British men-of-war when they were found under convoy of their own men-of-war, and some of them even when they were furnished with such passes as were required, upon information that they had wine and other things on board belonging to the enemy, which goods were condemned and the ships released.³

The only serious exchange of shot between the British navy and a neutral convoy arose from a different cause altogether, the old and already obsolescent claim that all other vessels whatsoever should strike their flags to British Queen's ships in acknowledgment of her sovereignty in the narrow seas. On July 27, 1704, Rear-Admiral Whetstone encountered seven Swedish merchantmen making for France under convoy of a warship. The convoying captain refused to strike and was the first to fire. Two of

¹ *Law and Custom*, II, 199 ff.; see also Lamberty, III, 403-5.

² Vernon's letters in *Portland Papers*, IX, 177-96.

³ Lords of the Admiralty to Secretary St. John, October 12, 1711, in *Law and Custom*, II, 219-20.

Whetstone's ships engaged him, and after suffering 150 casualties he, with all the merchant fleet, was brought into Yarmouth Roads. After being taken thence to the Nore three ships with contraband were detained, the man-of-war and the remaining four sail were released by Order in Council. For this release the pretext was the untrue allegation, which however saved the British Government from giving up its claim to the salute, that the captain had in the end dipped his flag.¹ Queen Anne's ministers contented themselves with expressing on her behalf a pious hope that the King of Sweden would punish the captain for his misbehaviour.² They were no longer punctilious about the formal salute when the practical operation of the right of search was satisfactory; in the Methuen treaty with Portugal in the previous year, a clause about honours to the flag had, after some discussion, been deleted.³ It may be as well to add that the English were not the only nation who were hard to please in these matters. A Swedish captain extorted money by threats from a Dutch skipper for a pretended refusal to salute.⁴ The Danes continued to give trouble over the salutes due to the royal castle of Kronborg.⁵

To neutral commerce the attitude of the Dutch did not coincide altogether with that of the English. They treated it with more asperity, and consequently it gave them greater trouble. The first reason for this greater harshness was the uncontrollable ardour of the privateers of Zeeland (one of the seven provinces of the Dutch Republic) in the pursuit of neutral vessels, and the callous indifference of the Zeeland Admiralty Court and the states of the province to mere matters of law when it came to deciding whether the captured ships should be declared lawful prize. Another factor was the desire of Dutch merchants to compete with neutrals, especially the Danes, in the trade with France. This seems to have operated especially to the disadvantage of the Danes during the brief period when all Dutch trade with France was prohibited. Being themselves driven to clandestine methods in their trade with the enemy, the Dutch obstructed by all possible means the efforts of the neutrals to become carriers for the French, especially in the lucrative trade of carrying French wines to the north of Europe. This again was a cause which did not influence

¹ Lamberty, III, 405. Whetstone's action is praised by Alexander Justice, *General Treatise of the Dominion and Laws of the Sea* (1705), p. 193.

² Godolphin to Harley, July 31, 1704, in *Hist. MSS. Comm.*, *Bath Papers*, I, 61.

³ Burnet, *Own Time*, II, 352-3.

⁴ Lamberty, V, 413.

⁵ *Ibid.*, VI, 437; *Recueil van Zeezaken*, III, 618, 626; *Portland Papers*, IX, 170.

the English, because English commercial policy, for a long time before the Methuen treaty, had shut out French wines on the ground that their importation was harmful to the balance of trade, and by that treaty the English were made into a nation of port-drinkers. On the termination of the period during which the allies restrained their subjects from trading directly with France, the Dutch regained their old advantage in competing against Danish or Swedish shipping.¹ The Danes even feared, though on insufficient grounds, that the Dutch would add to their standing economic advantages a commercial agreement with the French.² The French, as might have been expected, did what they could to attract neutral shipping to their ports so long as it did not touch at an enemy port on its way. They relieved it for the time of the war from the burdensome duty of fifty *sous* per ton on goods imported on foreign ships. When the removal of the general prohibition on Dutch trade with France again exposed the neutrals to the competition of Dutch shipping, the French came to their help with decrees lightening the duties on certain exports and on imports of the general nature of contraband if carried by them.³ On another matter the French law was relaxed solely in favour of the Swedes since the Swedes had not, like the Danes, undertaken to limit the quantity of their trade with France. Ships bought by Swedes from the enemy during the war were to be allowed to count as Swedish ships. An enemy supercargo, merchant, officer, or sailor was not to make a Swedish ship liable to confiscation.⁴ For the time being another edict remained in force which worked solely to the detriment of Denmark. This declared that those who, being subjects to an enemy, had naturalized themselves in a neutral country since the declaration of war should be treated as enemy subjects.⁵ It was thus more difficult for the Danes than for the Swedes to make *bona-fide* additions to their merchant marine by recruiting English and Dutch personnel or to allow Englishmen or Dutchmen to sail fraudulently under their colours. This was, however, mitigated at the beginning of 1705.⁶ With

¹ Vernon to Harley, March 13/24, April 3/14, 1705, July 16/27, 1706, in *Portland Papers*, IX, 184, 188, 259.

² Same to same, May 15/26, 1705 ; *ibid.*, IX, 192.

³ Lamberty, III, 750.

⁴ *Ibid.*, 676. Other clauses affirm the principles that the Swedish flag is to cover enemy goods and that enemy goods may be carried by Swedes so long as they are not carried from one enemy port to another.

⁵ Edict of July 12/13, 1704, in *Nouveau Code des Prises* ; Vernon to Harley, February 13/24, 1705, *Portland Papers*, IX, 179.

⁶ Edict of January 17/28, 1705, in *Nouveau Code des Prises*.

their French trade sinking fast as the Dutch gained it from them, the Danes allowed themselves to be deluded with false hopes of a commercial treaty with France, submitted tamely to an affront to their minister there, and insisted obstinately on their grievances against the Dutch.¹

The States-General, who were responsible for the foreign relations of the Dutch Republic, espoused the cause neither of the Zeeland privateers nor of the traders with the enemy. Inch by inch they bore down the obstructive provincial opposition, which took advantage of all the intricacies of federal constitutional procedure. They went so far as to revoke on September 27, 1703, all commissions granted to privateers. There was talk even of proceeding against some of the privateers as pirates, though it was feared that such a measure might provoke the secession of Zeeland from the union. In the end concessions mixed with firmness led to the settlement of some of the difficulties and the postponement of others. Swedish and Danish ships taken before the outbreak of hostilities were restored, but a difficulty remained about compensating their owners for their unjust detention. Neutral ships captured from enemy captors provided further disputes. In 1702 the Swedish merchants, without the open approval of their ambassador, made their own terms privately; but the Danes still held out. Next year, having fresh irregularities to complain of, they threatened reprisals; it was to avert these that the States-General used their strongest pressure against Zeeland. In 1704 at last the King of Denmark, after eight weeks warning, seized a Zeeland East Indiaman at Bergen. This year complaints came from all sides against the Zeelanders, not only from Denmark and Sweden but from Holstein and England. In the province itself, at Middelburg, there were riotings.² Two years later the province of Holland found its own shipping assailed by its lively neighbour. Ships of Holland with French brandy and other goods were seized. A convention between the two provinces settled the dispute and consequently the States-General passed on September 5, 1707, a resolution, for the due execution of which pressure still had to be applied to Zeeland, specifying the goods (wool, iron, and others) for the importation of which passports were to be granted to Spanish and neutral ships.³ The Danish controversies, however,

¹ Vernon to Harley, January 12/23, June 4/15, July 16/27, 1706; *Portland Papers*, IX, 220, 252, 259.

² The documents in Lamberty, Vols. II, III, XII, give full information on these questions.

³ *Recueil van Zeezaken*, III, 483, 516, 525, 535.

dragged on. In the last stages of the war the Danes turned the tables on the Dutch, whose Baltic trade was also suffering at the hands of both Swedes and Russians, by arresting their ships wholesale in virtue of a new regulation of their own about the rights of neutrals in the Northern war. The English proposed joint action with the Dutch in this matter, but without success.¹ They were themselves giving protection to Swedish merchants against Danish ships of war.² From 1709 to 1715 the Danes took up forty-five Dutch ships or more ; another estimate gives the number between 1710 and 1720 as 135. The liquidation of the Dutch claims relating to these ships was made together with that of the old Danish claims for the Spanish Succession war, and the most important steps in the combined settlement were not taken until about 1727.³

One other incident of the war should be mentioned. In the spring of 1709 the sea Powers became aware that there was a serious shortage of corn in France and that the French were making exceptional efforts to obtain it by all possible means, whether from the Baltic or from England, directly or by way of intermediate, for instance Spanish, ports. There was thus an opportunity of repeating the action taken in the similar conjuncture of 1694 when corn had been treated as contraband. An Order in Council now declared " that all sorts of corn that shall be bound in any ships whatsoever to the enemy's country is and shall be deemed contraband ", and also prohibited the exporting of corn from England.⁴ The intention was to act as in 1694, detaining the cargoes of corn but paying for them. The Dutch took measures similar in effect to those of the English. Having a land frontier they had to make more elaborate provisions against the exporting of corn, and supplementary edicts added starch, rice, barley, and groats to the list. All corn-ships bound for France were to be seized and the captors were to receive the whole prize if it was of Dutch or allied nationality. If it was neutral, the captor was to have forty guilders (rather less than £4 sterling) for each last of grain and also the amount of his expenses. Neutral cornships were to be unloaded and released. Provision was made against collusive capture, ransoming in lieu of capture and fraudulent insurance transactions for such ships. In the spring of 1710 a

¹ St. John to Strafford, November 2, 1711, in *Correspondence*, ed. Parke, I, 288. *Secr. Res. Holland*, September 10, December 9, 1711 ; March 17, April 8, 1712 ; December 14, 1713.

² Hedges to Burchett, July 13, 1711, in *Law and Custom*, II, 217-18.

³ Kernkamp, *Baltische Archivalia*, pp. 96-107, 109, 114-15.

⁴ *Law and Custom*, II, 160, 210 ff.

further resolution of the States-General, though nominally prolonging the former decrees, virtually ended the restrictions by permitting, in the interests of trade, the export of corn to Lisbon, Catalonia, Brabant, and Flanders.¹ In these decrees the word "contraband" is not used, and although in the English Order in Council it is applied, none the less it is clear that the British were not, in the strict sense, treating corn as contraband, though they had a long-standing claim to do so if they wished. To have done so would have meant confiscating the cargoes without compensation. Instead of pushing the matter to this length they were content, with the moderation characteristic of the handling of neutral trade in this war, to take cargoes in exchange for payment. In this course, so far as I have been able to ascertain, the neutrals acquiesced.

In this episode, as in the others, British dealings with the neutrals were comparatively easy and mutually satisfactory. It must, therefore, seem surprising that, without any obvious reason in the experience of the war, in the Treaty of Utrecht a clause was agreed upon between the English and the French which regulated the policy of the two nations in regard to neutral trade. This is the seventeenth article² of the Anglo-French commercial treaty, and it has set for historians three separate riddles. The first concerns its meaning and effect. The late Sir Francis Piggott conclusively established the right interpretation, namely that the clause relates only to the event of war between either of the con-

¹ The successive edicts of April 11, May 24 and 30, June 17, July 22, October 10, 1709, March 4, 1710.

² "*Magnae Britanniae Reginae, et Regis Christianissimi Subditis omnibus et singulis licitum erit, cum suis Navibus, omni cum libertate et securitate, nulla distinctione habita quinam Mercium in iisdem oneratarum Proprietarii sint, navigare à quocunque Portu, ad loca eorum quibus Inimicitia aliqua cum Magnae Britanniae Regina, aut Rege Christianissimo, jam aut dehinc, intercedet; Licitum ibidem erit Subditis et Incolis praedictis, cum praefatis Navibus et Mercibus navigare, et negotiari eadem cum libertate et Securitate à Locis, Portubus, et Stationibus eorum, qui utriusque vel alterius Partis hostes sint, absque contradictione et perturbatione qualicunque, non tantum directe ab illis praememoratis Locis hostilibus ad locum neutralem, verum etiam ab uno loco hostili, ad locum hostilem alium, sive illi sub Jurisdictione ejusdem Principis sint, sive sub diversis. Et sicut jam circa Navigia et Merces stipulatum est, ut Naves liberae Libertatem quoque Mercibus vindicent, atque pro immuni ac libero habeatur omne id, quod Navibus ad Subditos alterius Foederati spectantibus immissum deprehendatur, etiamsi totum Oneris, vel ejusdem pars aliqua, ad hostes utriusvis Majestatis pertinuerit, Exceptis semper Mercibus Contrabandis, quibus interceptis omnia ad Articulorum subsequentium mentem fiant. Ita Convantum pariter est, eandem Libertatem ad personas, quoque extendi debere, quae Navi libera vehuntur, eo cum effectu, ut quamvis utriusque Partis, aut alterutrius hostes sint, ex Navi ista libera non extrahantur, nisi milites sint, et hostibus effective Ministeria sua praestent.*"

tracting Powers and a third party, in which event it only exempts from capture goods of that third party in the ships of the contracting party which had remained neutral.¹ He was right also in saying that the clause represented no new departure in British policy, and on this point his view may be confirmed from the very interesting manuscript notes made by Lord Carteret, who compared this clause with four earlier English treaties, those of 1667/8 and 1674 with the Dutch, that of 1667 with Spain, and that of 1676/7 with France. His notes are undated, but were clearly made on the occasion of the drawing-up of instructions for Admiral Haddock at some time during the war of the Austrian Succession in or after 1742. Carteret concludes: "If too much therefore should be said against the Utrecht Treaty of Commerce, it would look like want of being sufficiently informed of former Treatys with the like Stipulations, and those that made that Treaty may justify or at least excuse themselves by so many precedents."² In one respect, however, Sir Francis Piggott underestimated the number of Powers who were by treaty entitled to a like freedom when England and France or Holland and France were at war; he had not noticed the Danish agreements dealt with in the present article.³ It should also be remembered that France, when at war and in a position of naval inferiority, made, as has been shown in the case of the Spanish Succession war, unilateral concessions to neutrals in excess of their treaty rights.

The second puzzle about the Utrecht clause is whether it ever came into force. Reddie pointed out that France never observed it, and that by England it "was neglected, or rather, by tacit acquiescence, was voluntarily departed from by each of the contracting parties". There does not seem to have been any solid ground for doubting its validity; it was not affected by the English Parliament's rejection of two commercial clauses in the same treaty. By 1752, however, Carteret, by then Lord Granville, had come to doubt, on what grounds does not appear, of its being in force; but the Privy Council, which at that period heard appeals in prize cases, decided the point against him.⁴ At that time the application of the treaty had become part of the general controversy excited by the dispute over the Silesian loan.

¹ *The Freedom of the Seas* (Handbooks prepared by the Hist. Section of the Foreign Office, No. 148), pp. 14 ff. I am disinclined to accept the contention put forward on p. 24 that the word "déjà" refers to the treaty of 1677; if that had been intended I should have expected, not an incidental adverb, but an explicit mention of the treaty.

² Public Record Office, State Papers For., Treaty Papers, 97.

³ See his last paragraph on p. 27.

⁴ Doddington, *Diary*, pp. 130-2.

The third mystery remains, the question why this clause came to be inserted in the Utrecht treaty. Reddie made an unfortunate guess at the answer: "What led . . . to the insertion or renewal of these special stipulations does not appear, unless it arose from the great influence which the Dutch then possessed in Britain."¹ The influence of the Dutch during the Utrecht negotiations was diminished, and, in any case, the clause could not be of any advantage to them except in a contingency which no one can have contemplated, that of a war between Holland and France in which England was neutral. With much greater reason Sir Francis Piggott says, after suggesting an alternative explanation which he does not press: "The more probable explanation . . . is that the proceedings of the French during the war, especially the re-enactment of the law of 1681, had aroused suspicions; and that, therefore, a paraphrase, intended to remove any doubt as to the meaning of the earlier provision (of 1676/7), was introduced into the Treaty of Utrecht."² I have not been able to find any evidence which tends directly to confirm or to overthrow this theory, but some interesting sidelights may be found in the confused mass of papers at the Public Record Office. If they do not show why the clause was inserted, they do show pretty clearly how it came to be so.

It was an English proposal. The French offered to enter upon a treaty of commerce, and the British Secretary of State therefore sent out a project submitted to him by the Board of Trade. This was the draft treaty which had been prepared for the peace conference at Rijswijk in 1697 and had been again brought up in the Geertruidenberg negotiations of 1709. It was quite different in arrangement from the final treaty, and included no provisions for commerce in time of war; its contents were purely commercial. The plenipotentiaries turned it into Latin, but they also made drastic changes before handing it to the French plenipotentiaries.³ The words in which they announced these changes may be quoted: "We take leave to enclose the project of a treaty of commerce, which we have given to the French ministers and hope it takes in the substance of that drawn up by the Council of Trade, besides that it also includes all the particulars of a marine treaty which we have thought fit to insert, not only because it is usual in all other treaties, but also that our marine treaty with France appears to be very defective."⁴

¹ *Op. cit.*, p. 271 f., p. 273.

² *Op. cit.*, p. 25.

³ Plenipotentiaries to St. John, February 12, March 5, 1712; in State Papers For., Archives 259; Report of Board of Trade to House of Commons, August, 1714, in State Papers For., Treaty Papers, 97.

⁴ Plenipotentiaries to St. John, March 15, 1712, in State Papers For., Archives 259.

Secretary St. John referred this new draft to the Board of Trade for their comments ; but he also referred it to two civilians who doubtless concerned themselves specially with the clauses relating to warfare. These were Sir Charles Hedges, judge of the Court of Admiralty, and Sir Nathaniel Lloyd, the deputy Admiralty advocate in the absence of Sir Henry Newton whom he succeeded as King's Advocate in the next year.¹ Their observations, if they exist, have escaped my search.² The plenipotentiaries were not much pleased at the sight of them. "The civilians", they wrote, "have excluded several articles that were in the English project drawn by the Council of Trade and sent with my Lord Privy Seal ; and they have also excluded several others that are found in most treaties of commerce. We have no orders from you how far we are to regulate our selves by these opinions and therefore shall not think we do amiss if we still retain some of those articles which they seem to think useless, but which other treaty makers have thought needfull. At the same time we shall carefully observe such remarks and additions as they have made upon other articles wherein we own their lights are a good direction."³

St. John gave way and allowed the plenipotentiaries to retain such clauses "as you shall judge necessary ; although the civilians in their observations had marked them as fit to be omitted".⁴ Some months later a change was made in clause XV, which relates to the rights of foreign privateers in French or English ports.⁵ In the course of further remarks on the clause numbered XIX or XX in the final treaty the plenipotentiaries give a curious piece of information : "The French ministers have talked of having Corn and all materials for building and equipping Ships declared contra-band, but will we hope let it fall."⁶ They evidently did let it fall, for in the treaty (clause XX) these classes of goods are explicitly

¹ St. John to Plenipotentiaries, August 1, 1712, *ibid.* ; *Dict. of Nat. Biog.*, s.n. Lloyd.

² A note appended to St. John's dispatch of April 16, 1712 (in State Papers For., Archives 259), says that they were entered in No. 4 at the Office but not copied for want of time. I take this as an explanation of their absence from the transcript of "Office book No. 4" which begins at fo. 1807 of State Papers For., Archives 259.

³ To St. John, May 13, 1712, in State Papers For., Archives 259.

⁴ To Plenipotentiaries, May 10/20, *ibid.* Before receiving this they had drawn up "explications" (forwarded with their dispatch of May 26, *ibid.*) which are also to be sought in the "Office Book" which I have not been able to trace.

⁵ Bolingbroke to Plenipotentiaries, December 24, 1712, in State Papers For., Treaty Papers 97.

⁶ Plenipotentiaries to Bolingbroke, December 23, 1712, *ibid.* The draft of this letter is in Bodleian MS. Rawl. C. 391, fos. 47 ff.

excluded from contraband ; that is to say, although the English as belligerents against France treated them as such, they did not renounce their right, if and when they were neutrals and the French were at war, to carry them to either belligerent party. The French suggestion was probably not put forward in earnest : within a very few days the draft was submitted for the final approval of the Government at Versailles.¹

Nothing could illustrate more clearly than this last expression of English policy the absence from the minds of the Utrecht negotiators of any intention to codify sea-law in a way that should affect all Powers equally. But the records of the negotiations, defective as their later vicissitudes have made them, tell us still more about what the English plenipotentiaries wanted. Of the two plenipotentiaries only one dealt with commercial matters, the Lord Privy Seal, John Robinson, Bishop of Bristol and afterwards of London. He had long been interested in questions of maritime law, with which he had been much occupied as secretary, and afterwards as minister, in Sweden. As early as 1694 he had come to think that the best regulation for Swedish trade when England and France were at war would be to revert, with certain collateral safeguards, to the principle of "Free Ships, Free Goods".² Shortly before the outbreak of the war of the Spanish Succession he tried again to persuade the British Government to make with the Swedes "a treaty . . . upon the foot of free ships making free goods".³ It seems clear that this has a bearing on his conduct at Utrecht. He took the course, unusual for a diplomatist, of drastically redrafting the treaty sent out to him, adding without orders clauses on the matter in which his own special experience lay. He resisted the criticisms of the cautious experts at home. He wanted to have a thorough, well-drafted and comprehensive settlement with France of questions of maritime law. It was his own work, done on his own initiative, and it was not due to any dissatisfaction of his principals in England with the existing treaty. The fact that no remarks on clause XVII survive in the correspondence does not absolutely prove that none were made, but that may be provisionally inferred. The presence of this clause in the treaty of Utrecht thus becomes less mysterious. It represents

¹ It was sent on January 13 and returned on January 23, 1713 ; Legrelle, *La diplomatie française et la succession d'Espagne*, IV, 728-9.

² Clark, *The Dutch Alliance and the War against French Trade*, p. 115.

³ Vernon to Robinson, February 24, 1701/2, in *British Diplomatic Instructions*, I, 25-6.

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Bishop Robinson's policy of preserving for England and France as neutrals the rights which he had wished Sweden to enjoy when England and France were at war. Had it not been for the lack of any spirit of impartiality from his remarks on contraband, it would have been hard to resist the belief that he wished trade in time of war to be universally and impartially regulated on this plan.

THE ADMISSION OF STATES TO THE LEAGUE OF NATIONS

By LILIAN M. FRIEDLANDER, B.Sc. (Econ.).

"Law to-day rests on the legal philosophy of yesterday, and the political philosophy of the day before yesterday."—JESSE S. REEVES.

I

WHEN the League of Nations came formally into existence, on January 10, 1920, a new and to some extent puzzling factor entered into all questions of international law and of international politics. It is vain to attempt to fit the League into the framework of pre-war diplomatic technique or of pre-war conceptions of the legal relations between states.

The title alone of this new organization may seem to be a confusion of thought. The League is a league of states and not of nations—a distinction of some importance in Europe, where the boundaries of states and of nationalities are seldom coincident. The French name is the "Société des Nations", which is even more confusing, since the phrases "Society of Nations" or "Family of Nations" have been used by international lawyers for some hundreds of years to indicate first the state of Christendom, and later the civilized states all over the world, whether full or partial members of the "Family". When the membership of the League of Nations is as universal as its founders hoped it might soon become, it will truly be the organized expression of the community of nations. At present, however, with fifty-six states Members of the League, while Russia, Mexico, Turkey and the United States of America, are not Members, it is, perhaps, a trifle misleading to call the new organism by a name which had, and still has, a definite significance in international law.

The question of the admission of states to the League throws some interesting light on the impact of the League on established legal ideas. The original Members of the League were some thirty odd signatories of the various Treaties of Peace, as well as a number of states which had been neutral during the World War, but which were especially invited to accede to the Covenant without reservations.¹

¹ For details of the various ways in which the original Members came into the League, including the special case of Switzerland, see an article by Manley O. Hudson entitled "Membership in the League of Nations", in the *American Journal of International Law*, Vol. 18, No. 3 (July 1924).

Article 1 of the Covenant laid down the principles on which new Members were thereafter to be admitted to the League in the following terms: "Any fully self-governing state, Dominion or colony . . . may become a Member of the League if its admission is agreed to by two-thirds of the Assembly." Two conditions must be fulfilled: the applicant must give "effective guarantees of its sincere intention to observe its international obligations", and it must also "accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments". On the basis of these two sentences, which by their deliberately loose wording can have wide implications, the Assembly of the League questions the applicant state and decides on its suitability for admission. It is noticeable that the admission of states to the League is left entirely in the hands of the Assembly, where all Member states, great or small Powers, are represented on a basis of equality, having one vote each; a two-thirds vote is sufficient to admit a new Member.

Notice, too, the phrase "fully self-governing state, Dominion or colony". Here we have a formula which invites endless argument in the realm of political theory. When is a state "fully self-governing"? When it has established some form of representative government? Is democracy the test in a post-war world supposedly made safe for democracy? And if so, who can define democracy in precise political terms? Must the applicant state be a fully sovereign state, according to international law, or may it be semi-sovereign? Is independence the criterion? When is a Dominion or colony "fully self-governing" and yet not a state?

The makers of the Covenant, in their attempt to create a political organization into which the British Empire would fit, used the phrase "state, Dominion, or colony". Once admitted to the League, Members are on a footing of legal equality; yet in the eyes of international lawyers, sovereign states alone can be international persons. It is, at the moment, a nice point of discussion whether Canada, New Zealand, Australia and South Africa—formally recognized as separate "Nations" within the British Commonwealth—are, in fact, persons in international law. The first marked sign of this change in their status came with their admission as original and full Members of the League of Nations, but the juridical significance of this act remains undefined. India also became an original Member of the League, yet no constitutional lawyer could possibly call India a separate and self-governing nation within the Commonwealth.

At its First Assembly in 1920 the League of Nations received requests for admission from sixteen states. This figure was increased to twenty-four within the first six years of the League's existence. We shall endeavour to trace out the main lines of the unsystematic system of jurisprudence which grew up around this question of the admission of states.

The League soon found that the work of admitting new Members inevitably brought it into conflict with the theories of international law elaborated in pre-League days. In particular, it came up against the theory of "recognition", and the extent to which admission to the League superseded recognition, was synonymous with recognition, or was entirely separate from it. From earliest days, too, there has been conflict between what are conveniently but inaccurately called the "Anglo-Saxon mind" and the "Latin mind", between those who want to deal with problems as they arise without previous legal limitations, and those who want first to lay down a precise formula and then fit into it the facts which are met with; between, in short, the inductive and the deductive methods of logic. It is sometimes deplored that the Covenant of the League was not drawn up by legal experts. This seems to be its one salvation. The League was and is a vast experiment in international politics: to have given it too rigid a constitution would have been fatal. So in this question of the admission of states, we find the "Anglo-Saxon" method triumphing over the "Latin" method, to the evident benefit of the League.

II

According to the principles of International Law, a state may exist without recognition; it may even "possess all the rights and attributes of sovereignty",¹ but "formal membership in the family of nations appears to be an essential condition of the enjoyment of legal rights".² This formal membership, which may be full or partial, is shown by "recognition".

Recognition of a state has been described as "the assurance given to a new state that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations".³ Indeed, Oppenheim states categorically that "a state is and becomes an international person through recognition only and exclusively",⁴ though the granting or the

¹ Rivier, quoted Moore's *Digest*, I, 72.

² Fenwick, *International Law*, p. 83.

³ See note (1) *supra*.

⁴ Oppenheim, *International Law*, 3rd edition, I, 134-6.

denial of recognition is not a matter of international law but of international policy, and is always a matter entirely within the province of the political (or executive), as distinct from the judicial, branch of the government.

Recognition of a state is usually given separately, and often at various times, by its fellow members in the "Family of Nations". But sometimes the "Concert of Europe" or other group of Powers have accorded a collective recognition to new states. Such collective recognition was given, for instance, in the Treaty of Berlin to Serbia, Rumania and Montenegro, and again in June 1919 by the Allied and Associated Powers to Poland.

Collective recognition may be accorded on such terms as the recognizing Powers desire. They may establish conditions for the admission of the new state or states to the "Family of Nations", and the violation of these conditions, though it apparently will not justify a withdrawal of recognition, may warrant a right to intervene in order to secure fulfilment of the original demands.¹ The theory and the practice of conditional recognition received a new vigour after the World War, and it figured in the discussions on the admission of new Members to the League of Nations.²

There is also in international law an important difference between recognition of a new state and recognition of a new type of government in an old-established state. Recognition of a new government may be either of a "de facto" or a "de jure" government. Professor W. W. Willoughby maintains that "to international law the distinction between governments 'de facto' and governments 'de jure' is without juristic significance; a government which is recognized to be 'de facto' is thereby 'de jure' as well, so far as its international status is concerned".³ On the other hand it has been said that "this distinction is substantial, because it makes it possible for the recognizing state to 'do business' with the other state without expressing any opinion upon the legality of its internal proceedings".⁴ These distinctions played their part in the debates of the Assembly of the League, but the political atmosphere tended to blur subtle juristic arguments.

Writers on international law usually maintain that "recogni-

¹ Charles Cheyney Hyde, *International Law*, I, p. 37.

² See p. 97 *infra*.

³ W. W. Willoughby, *Fundamental Concepts of Public Law*, p. 311.

⁴ *British Year Book of International Law*, 1921-2, pp. 58-9.

tion, if once given, is incapable of withdrawal ” ; ¹ but provisional “ de facto ” recognition, with reservations, has been accepted by English courts as sufficient to remove from their jurisdiction vessels belonging to the government so tentatively recognized.²

In an article recently published in the *British Year Book of International Law*,³ Sir John Fischer Williams discusses the question : “ whether in international law as it now exists, a good title is acquired to territory by actual occupation, based on force, without the consent of the Power dispossessed, or whether the consent of that Power is needed to perfect the title of the occupier. ” ⁴ The dilemma, as he sees it, is this :

“ A state cannot exist without territory. On application for the admission of a state to the League of Nations, one of the questions asked by the League is whether the state has settled frontiers . . . Suppose that the state is in the position of Rumania, whose dominion in Bessarabia has been recognized by the general body of states, but not by Russia. If the doctrine of the necessity of the assent of the outgoing state is to be maintained, we must either say that the applicants are inadmissible for membership, . . . or that the League must neglect the doctrines of international law. But that the League should defy international law is unthinkable ; . . . and that the applicants for membership of the League who are in such a condition should be inadmissible is a patent absurdity. ” ⁵

Here we have an excellent picture of one aspect of the situation which faced the First Assembly.⁶

At one point in his discussion of this question of recognition, Oppenheim refers to some “ other writers ”—Hall, Rivier, &c.—who “ assert that theoretically every new state becomes a member of the Family of Nations *ipso facto* by its rising into existence ”.⁷ Again, Professor J. S. Reeves of Michigan, in an attempt to build a new politico-legal philosophy on the basis of a factual survey of the international world, regards the “ existence ” of a state as constituting its “ right to recognition ”. But he, too, seems to fall into a vicious circle, by stating that recognition is one of the criteria of what he calls the “ normal state ”, while a state cannot function normally until it is recognized.⁸

It would seem that pure juristic theory is neither clear nor adequate for our purposes. Let us now turn to the practical side of the problem.

¹ Oppenheim, *International Law*, I, 134–6.

² See note (4), p. 87 *supra*.

³ “ Sovereignty, Seisin and the League ”, *B.Y.B. of Int. Law*, 1926.

⁴ *Op. cit.*, p. 26.

⁵ *Ibid.*

⁶ See p. 92 *infra*.

⁷ Oppenheim, *loc. cit.*

⁸ J. S. Reeves, *La Communauté Internationale*, Paris (1925), ch. 1.

III

The states applying for admission to the League in 1920 ranged in size and status from Austria, recognized by all countries, to Azerbaidjan, recognized by none. The Assembly referred their claims to its Fifth Committee, which thoroughly investigated the problem and finally drew up a questionnaire under five heads. The Committee asked :

- (1) Was the application in order ?
- (2) Was the Government applying for admission recognized " de jure " or " de facto " and by which states ?
- (3) Was the applicant a nation with a stable government and settled frontiers ? What was its size and population ?
- (4) Was it fully self-governing ?
- (5) What had been its conduct with regard to (i) its international obligations ; (ii) the prescriptions of the League as to armaments ? ¹

The second, third and fourth of these questions concern us in this study. Not only did this questionnaire involve an interpretation of Article 1 of the Covenant, but it inevitably precipitated argument on the famous Article 10, as well as on the question of " sanctions ".

From the beginning the Committee was obliged to face the legal problem of recognition. At its first meeting, the delegate from Holland asked if admission to the League implied " de jure " recognition by every Member of the League ? M. Politis, the brilliant Greek lawyer, thought it would do so. Lord Robert Cecil, then representing South Africa, claimed that the rules for admission were stated in Article 1 of the Covenant, and they in no way infringed the liberty of individual states in other matters.² Here we have in a nutshell the conflicting opinions reached by a sub-committee of jurists later.³ At the second meeting, the Committee followed the leadership of Lord Robert Cecil, even the French and Belgian delegates finally agreeing that it was more a question of expediency than of legal theory.⁴ The difficulty was shelved, and the practical results obtained were, in the main, politically wise though juridically anomalous.

There were the defeated states of Austria and Bulgaria, " fully self-governing " and recognized " de jure " by all the Great

¹ Records of the First Assembly, Meetings of the Committees, Vol. II, p. 212.

² *Ibid.*, p. 157.

³ *Ibid.*, p. 160.

⁴ *Ibid.*, p. 161-2.

Powers, with stable governments and frontiers delimited by the Peace Treaties. Their only trouble arose over disarmament problems, and after some discussion, in Committees and in the Plenary Meetings of the Assembly, they were admitted to the League.¹

There was Liechtenstein, juridically a sovereign state which had concluded treaties and was recognized "de jure" by several other states; but so small in size that it had contracted with neighbouring states for the control of its customs and diplomatic representation.² Luxembourg, again, was found to be an "independent state, with a free and representative form of government", recognized by other states and admitted to several international conferences, but very small in size.³

The First Assembly decided to admit Luxembourg, but to allow Switzerland to represent Liechtenstein. It did not consider the applications from the still smaller principalities of San Marino and Monaco. On the question of principle involved, it was said that the "smallness of a state does not prevent its being admitted into the League", and the Assembly recommended that the Council should consider "whether and in what manner it would be possible to attach to the League of Nations sovereign states which, by reason of their small size, cannot be admitted as ordinary members".⁴ The question, however, is full of difficulties, and no general rules were laid down; the Covenant contemplates only one class of Member-state, and would need to be amended if, for instance, small states were to be represented without voting powers.⁵

The government of Costa Rica was not represented at the Peace Conference of 1919, mainly owing to the objection of the United States of America, which had not recognized it at that time. In 1920 a popular representative government in the "fully self-governing state" of Costa Rica was recognized by some thirteen states Members of the League of Nations, and admitted to that organization.⁶

Finland was one of the "new" states of Europe, which had recovered or achieved independence after the break-up of the

¹ Records of the First Assembly, Plenary Meetings, pp. 570-2, 577, 581, Committee Meetings, Vol. II, pp. 163-8, 168-70, 217-18, 233-8.

² *Ibid.*, Plenary Meetings, p. 642; Committee Meetings, Vol. II, pp. 172-3, 217.

³ *Ibid.*, Plenary Meetings, pp. 585-6; Committee Meetings, Vol. II, pp. 184, 225-7.

⁴ *Ibid.*, Plenary Meetings, p. 643.

⁵ Records of the Second Assembly, Meetings of the Committees, Vol. II, pp. 17-21, 131-4; Plenary Meetings, pp. 134, 685-6.

⁶ Records of the First Assembly, Meetings of the Committees, Vol. II, pp. 173, 220-1; Plenary Meetings, p. 582.

Austrian and Russian Empires. The First Assembly of the League found that Finland had "all the characteristics of an independent state", with a government on democratic and representative lines, recognized "de jure" by twenty-four states Members of the League, as well as by Soviet Russia, Germany and the United States of America. Finland was accordingly admitted to the League, without prejudice to the question of the Aaland Islands, a matter in dispute between Finland and Sweden, then awaiting the decision of the Council.¹

In the case of these six countries which applied for admission to the League, no vital difficulties of principle or practice had arisen. But the new Caucasian and Baltic States, which lay on the south-western and north-western fringes of Soviet Russia, brought the League up against the importance of "recognition" and the implications of Article 10 of the Covenant.

First, Armenia. In March 1918 a republic had been constituted; it had, apparently, no very stable government in 1920; its frontiers were to be fixed by decree of President Wilson, and there had been a hope that the United States or some other Power would accept a mandate over the territory. Yet the Armenian government, representing a sovereign state, had signed the Treaty of Sèvres, and this it claimed was equivalent to "de jure" recognition by all other signatories.² There were rumours that a Soviet government had been set up in Armenia, in close alliance with Moscow; the Treaty of Sèvres was not ratified in 1920, and was later torn up as a result of the Turkish victories in Asia Minor.

Georgia, again, had apparently a stable government though as yet no fixed frontiers; it was recognized "de facto" by Great Britain, France and Italy, and "de jure" by Soviet Russia and Germany.³ The Ukraine had neither a stable government nor fixed frontiers, and was recognized "de facto" only by Poland, Finland and Latvia.⁴ Azerbaidjan had even fewer qualifications for admission.⁵

Dr. Nansen hoped that the admission to the League of both

¹ Records of the First Assembly, Meetings of the Committees, Vol. II, pp. 185, 227-30; Plenary Meetings, pp. 584-5.

² *Ibid.*, pp. 174-5, 195-9, 211-219; Plenary Meetings, pp. 587-94.

³ *Ibid.*, Meetings of the Committees, Vol. II, pp. 183, 195-9, 221-2; Plenary Meetings, pp. 630-4.

⁴ *Ibid.*, Meetings of the Committees, Vol. II, pp. 174, 222-3; Plenary Meetings, p. 642.

⁵ *Ibid.*, Meetings of the Committees, Vol. II, pp. 173, 219-20; Plenary Meetings, p. 642.

Georgia and Armenia would help to stem the spread of Bolshevism; but, on the contrary, fear of Bolshevism prevented the Assembly from seriously considering the proposal. The Members of the League in 1920 interpreted Article 10 of the Covenant as a binding obligation to guarantee, if necessary by force and without delays, the "territorial integrity" of all fellow Members. And no country wanted to find itself at war with Soviet Russia in defence of the somewhat undefined frontiers of these unstable Caucasian republics, which for some time would clearly be liabilities rather than assets to the League.

The new Baltic States—Estonia, Latvia and Lithuania—also applied for admission to the League. The Fifth Committee of the Assembly found that all three had stable and "free" governments; they were recognized "de jure" by Soviet Russia, and "de facto" by a number of Great Powers, including Great Britain, France and Italy. The Committee emphasized the fact that "these states have on their borders territories occupied by populations in a condition of disorder and not amenable to the influence of the League", and wondered whether "it would not be more strictly in accordance with legal practice to wait until (these states) can bring positive proof of their international status in the form of recognition "de jure" by the states Members of the League."¹

Was conditional admission legally possible? Could a formula be devised for official relations between the League and such states, without involving full admission? How far were legal considerations to determine political action? Eight out of the sixteen applicants for admission in 1920 were republics set up on territory formerly part of the Russian Empire; they had won their independence through war; in some cases their frontiers were none too secure and the "de jure" recognition accorded by the Soviet Republic was of doubtful permanence. The League was sympathetic, but necessarily cautious in its action; it endeavoured not to defy international law nor to commit political absurdities.

In the Plenary Meetings of the First Assembly the whole question was debated at length. Dr. Benes, of Czecho-Slovakia, admitted the difficulties where "there are new states, which have hardly begun to exist", which "cannot be recognized as consolidated states", which yet need encouragement and favourable treatment.²

M. Chagas, of Portugal, thought that "requests for admission

¹ Records of the First Assembly, Meetings of the Committees, Vol. II, pp. 183-9, 195-9, 230-3, 238-40; Plenary Meetings, pp. 615-30. ² *Ibid.*, Plenary Meetings, pp. 563-4.

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may be divided into two classes, those from states already constituted . . . and those from states which desire to confirm their existence by being admitted". In his opinion, recognition "de jure" was an act individual to the states which granted it, and the fact that the Baltic States were neighbours of a country which was liable one day to place them in danger did not seem to him a sufficient argument for refusing them admission. Accordingly we find M. Chagas submitting to the Assembly, in the following words, a resolution which he hoped to carry :

"Whereas the 'de jure' recognition of a state is an act by which individual relations are established between the recognising state and the recognised state, and whereas such relations have been defined by traditional international law, and are not necessarily quite the same as collective relations arising from Membership of the League of Nations" . . . (therefore, the Assembly should admit the Baltic States).

However, only the delegates of Rumania and Poland supported M. Chagas ; the Assembly as a whole was unwilling to commit itself to his views, at once dogmatic and vague.¹

M. Poulet, of Belgium, emphasized the two main conflicting points : that "there is no question of requiring as a 'sine qua non' for admission to the League recognition 'de jure' by all the Members of the League of the state seeking admission", but that nevertheless, "it is not reasonable for a state which does not recognise 'de jure' another state . . . to vote for the admission of the state which it does not recognise", because admission to the League implies the guarantee of Article 10 and is a more serious matter than the mere dispatch of diplomatic representatives to a foreign capital.² The three Baltic States were finally allowed to join the Technical Organizations of the League (Health, Transit, Labour, &c.,) on an equal footing with other states Members, and their applications for full admission were postponed to the Second Assembly. Georgia was similarly treated.

There remained one other small country with which the First Assembly had to deal—Albania, a state which was created and recognized by the Great Powers in 1914, which had no fixed frontiers or stable government in 1920, but which was finally admitted to the League, on the basis of Lord Robert Cecil's argument that the recognitions of 1914 had not lapsed and that Albania was a "perfectly constituted state".³

¹ Records of the First Assembly, Plenary Meetings, pp. 618–20.

² *Ibid.*, pp. 623–4.

³ *Ibid.*, Meetings of the Committees, Vol. II, pp. 189–91, 212–14 ; Plenary Meetings, pp. 643–57.

We have studied in some detail the work of the First Assembly in regard to the admission of new Members to the League, because it is in these early days of the League's existence that there grew up most clearly the inevitable conflict between an old international jurisprudence and an entirely new political organization. Can we deduce any general principles from the action of the Assembly in these sixteen cases? Merely this, it seems: that where legal formulae and political common sense are in opposition, law must give way to politics—a decision that was undoubtedly wise at the time and in the given circumstances. Further, the Assembly declined to state exactly what a “fully self-governing” state ought to be, but it obviously liked to feel that some form of representative and responsible government existed in the states Members. In short, the First Assembly showed a healthy disregard for logic, and handed on to the Second Assembly a legacy of problems for further investigation.

IV

The most revolutionary proposal connected with the problem of admitting new Members to the League had been put forward by the Argentine delegation in 1920. They wished to amend Article 1 of the Covenant, and the First Assembly decided that no amendments to the Covenant could be considered before the League was really firmly established. The Argentine government, injured, withdrew from active support of the League, but its suggestions were considered by the Council and by the Second Assembly.

The Argentine had desired that:

“All sovereign states recognised by the community of nations be admitted to the League of Nations in such a manner that if they do not become Members of the League this can only be the result of a voluntary decision on their part”.¹

The First (or Legal) Committee of the Second Assembly immediately seized on the question-begging phrase “sovereign states recognized by the community of nations”. Did it mean “*de jure*” or “*de facto*” recognition? How interpret “sovereign state”? Was it not clearly too vague an idea to be the sole qualification for admission?

“The actual quality of ‘sovereign states’ recognised by the community of nations”—so ran the Committee’s report—“does not express a well-defined idea . . . and recognition cannot be

¹ Records of the First Assembly, Meetings of the Committees, Vol. II, pp. 211; Plenary Meetings, pp. 261–2, 279.

expressed in precise legal terms." Although the distinguished Chilean member of the Committee thought it was possible to reconcile the Argentine proposal both with the principles of international law and with the Covenant of the League of Nations, the rest of the Committee agreed with M. Motta of Switzerland, that the suggested amendment was "unsatisfactory, unreasonable and unacceptable", and it was summarily rejected.¹

To the Second Assembly came the three Baltic States, again seeking admission. Estonia and Latvia had been recognized "de jure" by the Allied Supreme Council in January 1921, and since then by many states; they had maintained their independent existence for three years, and they were unanimously admitted to the League. Lithuania was in a different position, since her "de jure" recognition by the Supreme Council had been in "principle" only, and its announcement postponed till the Vilna question should be settled between Poland and Lithuania. This question, of course, never was really settled, though the League succeeded in stopping hostilities in that area; and after some delays the Assembly also admitted Lithuania into the League.² Not one of the Caucasian republics had consolidated its position sufficiently to warrant a second application for admission to the League.

In 1922 Hungary applied for admission—a state, which, according to the report of the Sixth Committee of the Assembly, "had for a long time been a member of the 'international family'", which was "self-governing" with frontiers fixed by treaty. Opposition centred on the subject of disarmament, but eventually a unanimous vote admitted another of the states vanquished in the World War.³

In 1923 two strikingly dissimilar countries sent their representatives to Geneva for the first time—the Irish Free State, and Abyssinia. The Sixth Committee of the Assembly, when investigating these claims, merely "noted" that the Irish Free State was "a Dominion forming part of the British Empire upon the same conditions as the other Dominions which are already Members of the League", and thus carefully and wisely evaded any legal point at issue.⁴ There was some difficulty in the case of

¹ Records of the Second Assembly, Meetings of the Committees, Vol. I, pp. 5–11, 13–17, 135–6; Plenary Meetings, pp. 677–8.

² *Ibid.*, Meetings of the Committees, Vol. II, pp. 518–22, 531–4, 579–86; Plenary Meetings, pp. 315–20, 333–40.

³ Records of the Third Assembly, Meetings of the Sixth Committee, pp. 21–2, 55–6; Plenary Meetings, pp. 115–17.

⁴ Records of the Fourth Assembly, Sixth Committee, pp. 11–12, 28; Plenary Meetings, pp. 24, 115–17.

Abyssinia ; though "fully self-governing", the power of the central government over the outlying provinces was doubtful, and this might affect their capacity to check the slave trade and the traffic in arms.¹ The government of Abyssinia could by no stretch of the imagination be called "democratic", but nevertheless the young Dominion and the age-old kingdom were given full and equal privileges in the new political family.

And in 1924 the Fifth Assembly found that the little Dominican Republic was an "independent and sovereign state"—though temporarily occupied by the troops of the United States of America till July of that year—and that the majority of the European and American states had diplomatic or consular representatives at San Domingo. The Republic was admitted to the League of Nations.²

In the years since 1924 only one state has been added to the Membership of the League, and that is Germany. The significance of this event in the sphere of world politics cannot be over-estimated ; the admission of Germany, though desired by all states Members, brought with it the problem of giving her the permanent seat on the Council which she rightfully demanded, and thus involved the League in the "crisis" of March 1926. In September of that year, the Council was re-organized and Germany entered the League, recognized as a Great Power, though she had been forcibly disarmed by the Allies, and possessed only a small army, a small navy and no air force—a good illustration of the importance which the twentieth century attaches to economic strength or "potential armament". At no time, of course, had there been the least opposition on legal or political grounds to Germany's admission as an ordinary Member of the League.

Two further points need elaboration—the importance of Article 10 of the Covenant, and the question of minorities, in regard to the admission of states to the League. Article 10, as we know,³ was drafted by President Wilson himself, and later used as a peg on which to hang much of the opposition to the League in the United States of America. Yet even in 1920, at the

¹ Records of the Fourth Assembly, Sixth Committee, pp. 12–16, 18–21, 26, 34–5 ; Plenary Meetings, p. 125.

² Records of the Fifth Assembly, Sixth Committee, pp. 18–19, 24–25 ; Plenary Meetings, pp. 184–5.

³ Article 10 runs as follows : "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and political independence of all Members of the League. In case of such aggression or . . . threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled."

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First Assembly, it was shorn of much of its supposed strength. The report of that same Fifth Committee which examined applications for admission contains a paragraph drafted by Lord Robert Cecil, to the following effect :

“ It cannot be too emphatically stated that Article 10 *does not* guarantee the territorial integrity of any Member of the League. All it does is to condemn external aggression on the territorial integrity and political independence of any Member of the League and call upon the Council to consider what can be done to resist such aggression ”.¹

At each of the first four Assemblies the Canadian delegation tried to get Article 10 struck out, amended, or “ interpreted ”, and after much discussion in legal and political committees, the real value of the Article was seen to lie in the fact “ that the principles which it expressed would in future form part of the conscience of the nations ”, to use the words of Signor Scialoja of Italy.² An interpretative resolution,³ embodying the views for which Lord Robert Cecil had argued in 1920, was finally drawn up by the Fourth Assembly, and would have been passed unanimously but for the opposition of Persia.⁴

The significance of Article 10 in the early days of the League was, thus, rather more psychological than actual, but it influenced the action of the Assembly in 1920, as we have seen, in regard to the admission of the Baltic and Caucasian republics.

Secondly, as to minorities. It has already been mentioned⁵ that before the World War the admission of states to the community of nations was sometimes ‘ conditional ’. In 1920 Lord Robert Cecil tried to establish the principle that states should

¹ Records of the First Assembly, Meetings of the Committees, Vol. II, p. 218.

² Records of the Fourth Assembly, 1st Committee, p. 17.

³ “ The Assembly, desirous of defining the scope of the obligations contained in Article 10 of the Covenant so far as regards the points raised by the delegation of Canada, adopts the following resolution :

“ It is in conformity with the spirit of Article 10 that, in the event of the Council considering it to be its duty to recommend the application of military measures in consequence of an aggression, or danger or threat of aggression, the Council shall be bound to take account, more particularly, of the geographical situation and of the special conditions of each state.

“ It is for the constitutional authorities of each Member to decide, in reference to the obligation of preserving the independence and the integrity of the territory of Members, in what degree the Member is bound to assure the execution of this obligation by employment of its military forces.

“ The recommendation made by the Council shall be regarded as being of the highest importance and shall be taken into consideration by all the Members of the League with the desire to execute their engagements in good faith.”

⁴ Records of the Fourth Assembly, 1st Committee, pp. 11–18, 24–29, 43–57 ; Plenary Meetings, pp. 75–87, 345.

⁵ See p. 87 *supra*.

only be admitted to the League of Nations if they gave adequate guarantees for just treatment of the minorities within their borders.

"As far back as 1878", said Lord Robert, "it was laid down that before any new state could be recognised by the comity of nations . . . and before any existing state received any considerable accession of territory, they were to enter into obligations to respect the linguistic, religious and racial minorities in their states. . . . That principle was fully recognised at the Peace Conference. Obligations to protect minorities were agreed upon with . . . Czecho-Slovakia, Serbia, Poland, Rumania, Greece and Armenia, and also Austria and Bulgaria."¹

It was undesirable to make a break in that policy, yet to fix a new condition of admission would be of doubtful legality under the Covenant and inadvisable as a matter of policy. Mr. Rowell, Canadian delegate, thought that since this was a purely European problem it could be dealt with by the Powers declining to give "de jure" recognition to governments which would not undertake these "minorities'" obligations. He clearly did not envisage any automatic connexion between the admission of states to the League and their recognition by all other states Members; but to adopt this suggestion would only have made confusion worse confounded. Again, there was the legal fiction of the "sovereignty of states", which must not be infringed.

In the end, the Assembly contented itself with passing a recommendation that, in the event of Albania, the Baltic and Caucasian States being admitted to the League, they should arrange with the Council how best to enforce the principles of the Minorities' Treaties in their respective territories. It is to be noted that the three Baltic States, on being admitted to the League at the Second Assembly, immediately undertook by declaration to negotiate with the Council on this matter.²

V

We have seen that political common sense and expediency form the basis on which qualifications for membership in the League are judged. The states invited to be original Members did not have to answer a questionnaire or satisfy an Assembly as to their independence and status; some of them would, perhaps, hardly have been admitted, according to the standards applied since 1920. Yet, despite political discrepancies and the juridical

¹ Records of the First Assembly, Meetings of the Committees, Vol. II, pp. 201-6, 207-10; Plenary Meetings, pp. 568-9.

² Records of the Second Assembly, Plenary Meetings, pp. 335, 337, 340.

anomalies which inevitably result, this part of the League's internal constructive work was thoroughly successful.

The mere existence of the League to-day is a challenge both to the "international anarchy" of the nineteenth century, which ended in the World War, and to many legal ideas—such as "sovereignty" and "recognition"—which we have inherited from an age when they had actuality. In particular, the dogma of official "de jure" recognition as the sole method whereby a new community is entitled to play its part in international affairs, has ceased to have any value, and needs to be overhauled or discarded. It is clearly impossible in practice, if not in theory, for states to work together in the Committees, in the Assembly and the Council of the League, unless they are all "recognized" and in normal diplomatic relations with one another. There are, however, the states which remain outside the League: the theory and practice of recognition still play a part in the relations between these states, and between non-Member and Member states. Until the League is universal in its membership a transitional stage in international law is inevitable.

Mr. E. J. Phelan declares categorically for the new order of things. In the course of an article on "The Sovereignty of the Irish Free State", recently published,¹ he says:

"The qualifications which a community must possess, before it can be admitted to cooperate on a footing of equality with other states . . . are to be found defined in Article 1 of the Covenant. . . . In the first place, two-thirds of the Assembly of the League must recognise that the qualifications exist. This is the equivalent of the old 'recognition'. But it is more definite and more impressive, because it must be collective."²

The implications of Article 1 are that a state must be independent, and that it must possess treaty-making power, the latter of importance where the Dominions of the British Commonwealth are concerned.

"The argument", continues Mr. Phelan, "is not that membership in the League alone confers effective international status. The argument is that only states which fulfil the qualifications required for membership, and which can accept the obligations involved in it, are to-day full international persons."³

Here we have a theory of international personality, and of the procedure for recognizing it, which is surely far more useful than the old juristic conceptions formed in a pre-League world. It is based upon the facts of the present international situation. It is

¹ *The Review of Nations*, Geneva, Vol. I, No. 3 (March 1927).

² *Op. cit.*, pp. 45-6.

³ *Op. cit.*, p. 46.

adequate to those facts, dynamic to suit a dynamic world, and simple. The results of several years of work, along empirical lines, by those who made the Covenant and those who built up the League, enable us to assert that admission to the League is, for the post-war world, what "recognition of a sovereign state" was before 1920, and that the qualifications laid down in Article 1 of the Covenant, judged as they are judged by the Committees of the Assembly, are the essential qualities of any independent state to-day.

THE PRE-WAR THEORY OF NEUTRALITY

By Miss V. M. S. CRICHTON, M.A.

AT the outbreak of the Great War there was a certain amount of unanimity among the nations with regard to the theory of neutrality. The practical application of that theory, it is true, still provided grounds for dispute, but no nation would have denied that the status of neutrality conferred certain rights which the belligerents were bound to respect. Such an abstract conception, involving both rights and duties, was not of ancient origin. Rather it was the result of a process of historical development which can be traced back to the seventeenth century, and which culminated in the early years of the twentieth. The growth of the theory, and its translation into practice, coincided with the application of the doctrine of sovereignty to the conduct of nation states. It now seems probable, both from the universal contingent belligerency provided for in the Covenant of the League of Nations and from the practice of the United States on the American Continent, that the pre-war theory in its entirety has become a matter of history. It can, therefore, be regarded as a whole, and it may perhaps be useful to consider the various stages of development. Such an examination suggests that the decisive factor in that development was the conflict which resulted from the adoption, by England and America, of radically different doctrines. The issue of that conflict, though long delayed, involved a reversal of English opinion with regard to the cardinal points in dispute, and an approximation towards the American standpoint which made possible the emergence of the modern theory of neutrality.

Educated public opinion in the United States was quickly awakened to the necessity of building up some theory of international relationships. Concerned to justify rebellion, the leaders of the new state had turned to Rousseau, and from his writings had derived the invaluable principle of the sanctity of human freedom. But as regards international law Rousseau could supply only half a doctrine—the other half was derived from the writings of Vattel; and it is from the dovetailing of the principal arguments of these two thinkers that the American theory of neutrality was built up.

The principal point in Vattel's teaching, that which distinguishes him from previous writers on international law, and

marks the beginning of the modern theory of neutrality, is his insistence on absolute impartiality and abstention from all interference on the part of the neutral states.¹ This was the basis of his teaching, and it was to this view that the United States gave explicit adherence in 1793. Jefferson's action was so far successful that France was forced to repudiate her ambassador, M. Genet, on account of the contempt which he had expressed for the "aphorisms of Vattel". Soon after, the "*Droit des Gens*" began to be cited in the English Courts, and by the end of the century Vattel had been admitted to the select band of authoritative writers on international law. It was in America however that his views achieved such particular importance, for there his political philosophy was adopted and enlarged to strengthen his theory of neutrality.

In 1775 Franklin wrote to C. W. F. Dumas at The Hague, "I am much obliged by the kind present you have made us of your new edition of Vattel. It came to us in good season, when the circumstances of a rising state made it necessary frequently to consult the Law of Nations. Accordingly that copy . . . has been continually in the hands of our Congress now sitting."²

Throughout the following century American Congresses kept Vattel's work in their hands, and the general principles which he laid down did much to explain, and still exercise considerable influence upon, American conceptions of international law.

Vattel's philosophy was derived from the teaching of Leibnitz, combined with the admiration of a liberal thinker for the precepts of Voltaire. From Leibnitz he adopted the optimistic view that true happiness can be achieved by perfection of development. Such happiness is the ultimate aim both of nations and individuals, and is to be obtained by co-operation. But co-operation is not the sole necessity for such improvement. Vattel, as the apostle of political liberty, laid even greater stress on the right, possessed by both the individual and the state, to self-preservation. His problem was to reconcile these fundamental principles of the independence and the interdependence of states, and he solved it by a system of perfect and imperfect rights. Perfect rights are those which are necessary for the preservation of independence,³ imperfect rights those duties which another state may be requested to carry out, without, however, the power of compelling

¹ Vattel, *Droit des Gens*, III, 103.

² Vattel, *op. cit.*, Preface by J. B. Scott in the Classics of International Law.

³ *Op. cit.*, II, 16.

such fulfilment.¹ Progress is achieved as the latter are transformed into the former by means of treaties and conventions ; a doctrine in accordance with prevailing views as to the sanctity of contract. The weak point of this distinction is suggested by the fact that the decision as to whether a right is perfect or imperfect, that is, whether it can be justly enforced by war or not, lies with the state itself. Or conversely that the nation of whom fulfilment of a duty is demanded is the sole judge of the moral issues involved.

Such a philosophy of international relationships, in spite of—perhaps in part because of—its inherent weaknesses, commended itself strongly to the leaders of American opinion. It emphasized on the one hand the sovereignty, absolute and independent, of every state ; on the other it gave expression to that humanitarianism and belief in progress which was characteristic of the age. When, however, it became necessary to apply the theory in actual practice it was evident that Vattel's teaching by itself was not all-sufficient.

Though both by circumstance and inclination the United States had little interest in the long-standing rivalries of Europe, yet, when increased colonization and the development of trade transferred those rivalries overseas, she was forced to consider her relationships with the Great Powers. Naturally questions of maritime law became of first importance, and particularly that portion of the law which affected neutrals. Turning to Vattel, American statesmen found that that writer had in the main been concerned with land warfare. He had given little attention to the very different problems which must arise through intercourse at sea, and while aware that a conflict must arise between the two "perfect" rights of independence and self-preservation, had been inclined to make the issue dependent on unavoidable necessity. Yet the battle of neutrality was to be fought out at sea, for the development of rival theories was only possible where belligerent and would-be neutral met on terms approaching equality.

American theory was not slow to develop. Though Vattel's teaching was inadequate there was one passage which, taken in conjunction with his general philosophy, proved an excellent starting-point. With regard to commerce Vattel lent the weight of his authority to the proposition that neutral trade, except in articles of contraband, should be free of all belligerent interference.² Such a generality, unmodified by any consideration of peculiar circumstances or of traditional usage, was invaluable to

¹ *Op. cit.*, Introduction, s. 17.

² *Op. cit.*, III, 112.

the neutral. Americans in particular were quick to adopt it, and to combine with it the great principle of the sanctity of individual freedom which they had derived from Rousseau. They felt that that principle had been justified by their past experience; they now proceeded to adapt it to their future needs. Rousseau had moreover asserted that it is nations and not nationals who make war. American theorists, therefore, were able to combine Vattel's general principle of abstention on the part of the neutral state from all interference, with the retention by the individual citizen of that state of complete freedom of action in matters of commerce. To the latter the rule of impartiality would not apply during a war any more than it had done in time of peace and there was no justification for demanding that his state should put any restraint on his activities. Finally Jefferson and his successors rediscovered the old slogan of "the Freedom of the Seas", which had first arisen in quite another connexion, and adopted it to justify their theory of neutral rights.

Thus, both through circumstance and inclination, American thinkers early worked out a theory of neutrality. Owing to political exigencies, opposition to and criticism of that theory came in the main from England. The English point of view, however, was never formulated with such precision as that of her opponents, and is to be discovered largely in the arguments to which particular conflicts gave rise.

The history of these various conflicts falls naturally into two parts. The Declaration of Paris has been generally taken to mark the abandonment by England of her old position, as well as the acceptance by Europe as a whole of a uniform doctrine with regard to "*le droit maritime en temps de guerre*". The United States, it is true, never formally acceded to the Declaration, but her experience in the American Civil War made her adherence inevitable in practice. After 1865 at least—and in effect after 1856—disputes between the maritime Powers were concerned, not with the theory of neutrality, but with its application; the fundamental divergence of principle is ended. Of the famous "Four Points" the first is relevant rather to the solution of the struggle than to its actual course, while the chief interest of the fourth belongs historically to the period after 1856. The key to the intricate and bitter conflicts of the preceding eighty years is to be found in the remaining two clauses.¹ Despite confusion of issue

¹ The text of clauses 2 and 3 is as follows: "2. Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre"; "3. La marchandise

and temporary questions of expediency, the acute controversy of nearly a century had centred round one great question ; what was the relation between the ownership of the goods and the flag under which they were carried ? It is by pursuing the arguments relevant to this issue that the conflicting theories may most easily be perceived.

The American and, generally speaking, the neutral attitude was well expressed by President Pierce in 1856 :

“ The laws of the United States do not forbid their citizens to sell to either of the belligerents articles contraband of war, or to take munitions of war or soldiers on board their private ships for transportation ; and although in so doing the individual exposes his property and person to some of the hazards of war, his acts do not involve any breach of national neutrality nor of themselves implicate the government.” ¹

In fact he restated the doctrines of Vattel and Rousseau to suit a particular issue. The crux of the whole matter, however, lay in the question of the relations of the neutral national to his own government. That government, as President Pierce made clear, disavowed all responsibility for him if he disregarded the laws of war, yet it left the question of punishment for any breach of those laws in the hands of the belligerents. On the other hand, if a national was engaged in operations which a neutral state conceived to be legitimate, that state was prepared to protect him to the fullest extent of its power. To quote President Pierce again (Second Annual Message, December, 1854) :

“ Long experience has shown that, in general, when the principal Powers of Europe are engaged in war the rights of neutral nations are endangered. This consideration led, in the progress of the War of our Independence, to the formation of the celebrated confederacy of armed neutrality, a primary object of which was to assert the doctrine that free ships make free goods, except in the case of articles contraband of war—a doctrine which from the very commencement of our national being has been a cherished idea of the statesmen of this country.” ²

Insistence was laid on the privileges of citizenship rather than on neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi ”. *State Papers*, Vol. 46, p. 26.

¹ Cited in Hall, *International Law*, 8th edition, p. 99.

² A clear distinction must, however, be drawn between the view put forward by the executive in the United States, and the practice which was followed in the Courts of Law. Despite the pronouncements of their statesmen, the American courts invariably acted upon the rule that enemy goods, carried under a neutral flag, were liable to seizure, except where there was a distinct treaty stipulation to the contrary. (See cases cited by Moore, *Digest of International Law*, Vol. VII, p. 451.) Nevertheless, England and other European countries naturally accepted such statements as those of President Pierce as representing the official standpoint of the United States.

its responsibilities. The distinction, so carefully insisted upon by Rousseau, between the state and the individual in International Law was difficult to recognize when the action of an individual was on occasion viewed as a state concern, protected by the national flag. A theory which insisted on the rights both of the citizen and of the government without any corresponding emphasis on their duties was bound to be illogical.

It was also, as England was quick to point out, a change from existing practice. Even Benjamin Franklin, though approving the new principle, felt bound to admit that "All the neutral states of Europe seem at present (1780) disposed to change what had before been deemed the law of nations, to wit, that an enemy's property may be taken wherever found, and to establish the rule that free ships make free goods."¹ The exponents of this new doctrine realized the weakness of their position, and attempts were made, in particular by France under the régime of Buonaparte, to meet England on her own grounds by reference to historical precedent.

In 1812 the Duc de Bassano, on behalf of France, advanced the view that the maxim "the flag covers the goods" was derived from the terms of the Treaty of Utrecht, and had thereby become part of the common law of nations.² Such a proposition, however, was easy to refute. Apart from the weakness of the general contention that all nations could be bound by a treaty, or rather a series of treaties, between certain individual states, the argument that England in particular had bound herself to the doctrine of "free ships, free goods" was not tenable. The famous Article XVII³ of the Treaty between England and France, on which the latter relied to prove her claim, was an amplification of a previous agreement reached in the Treaty of St. Germain-en-Laye of 1677. That treaty was of a type common to the seventeenth and eighteenth centuries, the object of which was to secure certain reciprocal advantages in matters of commerce. In the treaty of 1714 the position was restated. In Article 1 the general proposition was enunciated that in the event of either of the contracting states engaging in war with a third the commerce of the other should not be subjected to interference as a result of the war, an exception of course being made with regard to contraband. Later articles explained the particular implications involved in this general statement, and made it clear that this was no generalization

¹ Sir F. Piggott, *The Freedom of the Seas*, Peace Handbooks, Vol. XXIII, p. 39.

² Piggott, *op. cit.*, p. 14.

³ See p. 78.

on neutral right as such. It was merely an agreement between two nations as to privileges which should be mutually conceded in the event of either of those two nations going to war while the other remained at peace. In return for those privileges both sides made concessions. France abandoned the rule laid down in the Ordinance of 1681 that neutral ships carrying enemy goods were liable to confiscation, and England allowed that the neutral flag should cover enemy goods. But in both cases the concession was only valid when the neutral concerned was the other contracting party.

In fact an examination of the evidence contained in these treaties merely goes to prove the truth of Pitt's remark that any concession of the principle of "free ships, free goods" is a matter of grace and not of right. The French argument in 1822 was based on one particular example of a common type of agreement. The *quid pro quo* conceded by England in this one instance was given a general application. It would have been just as valid to argue that the principle of the flag was abrogated when Russia abandoned it in 1808 in return for special exemption from the Rule of War of 1756. Any attempt indeed to found the conception of neutral right advocated by France and America on treaty evidence was bound to be a failure. Historical precedent could not be used against England because it involved an appeal to evidence drawn from a period when no conception of the rights inherent in the status of neutrality existed comparable to that which was being urged at the opening of the nineteenth century.

Neutral theory, however, did not stand or fall by the question of historical verification. The position adopted by America was, as we have seen, based on abstract right inherent in the conception of sovereign states. The members of the Armed Neutrality League took up a similar standpoint, and it must be admitted that their arguments at one time or another gained the adherence of practically every civilized state save Britain. If general agreement could authorize the adoption of a maxim as part of international law then there was much to be said for the neutral contention. Yet a doctrine, to assure validity, should be held with consistence and here the record of England compares favourably with that of her opponents. General principles were apt to be forgotten by their exponents when changed circumstances forced them to face facts as belligerents. Even the United States, though ostensibly she declared war on England in 1812 in defence of neutral rights, was constrained to leave the whole question unmentioned when peace was made in 1814.

The relations between England and the other exponents of the rights of neutrality, into which it is not possible to enter here, also go to show the difficulty of consistent action. Nor was the inconsistency confined to action ; even in theory the argument of the neutrals was not carried to its logical conclusion. For the rule that free ships make free goods was at best only half a principle, unless it was followed by the necessary corollary that enemy ships make enemy goods. Surely such a conclusion was inevitable, granted the premise of the sanctity of the flag ! The silence of the neutrals on this count is significant, though unexplained. It suggests that the theoretical basis of the wide neutral claims had not been worked out in detail. The maxim " free ships make free goods " was of value to the neutral as a counter to the irritating British practice of " visit and search ". On the other hand if carried to its logical conclusion it might act to the detriment of the individual neutral trader. In view of later developments the omission suggests that some vague recognition of the fact that the two principles of the inviolability of the flag and the sacredness of private property could not always be reconciled. The English doctrine, besides being justified by appeal to earlier authorities, was also more complete in itself. The test was the ownership of the goods, not the flag under which they were carried.

This refusal to admit that the neutral flag was sacrosanct led to further trouble, particularly with America. In the disputes over the British practice of visit and search not only was the principle of the flag involved, but also the whole question of rival theories of citizenship. Originally the legitimacy of the practice in time of war was not denied, but when it came to be accompanied by impressment another issue was involved. The United States denied the right of the British Government thus to prevent her citizens from expatriating themselves, and insisted that those who had become her naturalized citizens had a right to the protection of her flag. On both sides of the Atlantic the two issues became inextricably confused, and it was a matter on which public opinion ran high. Further complications ensued when the question of the suppression of the slave trade became involved, and it was not until 1858 that Britain at last yielded, admitting that the right could only be enforced when established by treaty.

The whole controversy supplies another illustration of the difficulties involved in the uncertain relation of the neutral national to his own government. American insistence on the freedom of the individual was at the root of her opposition to the

English theory of citizenship. The neutral emphasis, as ever, was on the rights of her nationals; when these were threatened the state intervened. On the other hand, that state did not recognize any responsibility when the acts of her nationals, such as engaging in a trade previously closed, involved a direct stimulation of war. When the rights of neutrals were attacked appeal was made to the principles of international law, the duties of neutrals were left to the belligerents to enforce in individual cases through the application of the Rules of War. Not unnaturally appeals to two independent tribunals sometimes led to conflicting decisions.

The concession which England made in 1858 with regard to the vexed question of "visit and search" was indicative of a changed attitude. Indeed the change had already been made manifest in the Declaration of Paris of 1856, for, by agreeing to the four points, England categorically abandoned her old position. Such an astonishing *volte-face* seemed inexplicable, for there had been no indications of any such reversal of opinion after the close of the Napoleonic Wars. Canning had restated the English case in unequivocal terms in the treaty with Brazil of 1827. Clarendon himself as late as 1854 had prefaced England's Declaration to the neutrals with the words, "Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the Law of Nations".¹ In face of such evidence it is impossible to argue that England had been converted on the ground of abstract principle. Contemporary opinion in England was both startled and shocked. As Lord John Russell said, "There was no notice given to the people of this country or to either House of Parliament that any such question would be discussed". Nor did the Government make any effective reply to its critics. In fact the reasons for the action taken by Clarendon and Palmerston on this occasion have remained a mystery, which has only been solved within the last year.

That we are to-day in a more fortunate position than Lord John Russell is due to the very interesting article which appeared in the last volume of the Year Book of International Law under the title of "The Inner History of the Declaration of Paris".² Mr. Malkin has brought forward some valuable and hitherto unpublished evidence from which he has conclusively proved that the

¹ Piggott, *The Declaration of Paris*, 1856, p. 73.

² *The British Year Book of International Law*, 1927. "The Inner History of the Declaration of Paris", by H. W. Malkin, C.B., C.M.G.

English concession was a price paid for a definite object, namely the abolition of privateering. The possible use of privateers by Russia in the Crimean War was a source of anxiety to the British Government, as is shown in the note sent to the United States on April 21, 1854,¹ and this question was clearly in the minds of Her Majesty's Ministers when they were negotiating with France concerning the Declarations to be issued by the Allies to neutral powers. When the war was over it seemed evident to the British Government that those belligerent rights which Her Majesty had "waived" could never again be established in their entirety. A concession of principle seemed inevitable, and their policy therefore was directed to finding some adequate compensation. They were, at the same time, troubled by a proposal which the United States had recently put before the governments of various states in Europe and America—a proposal which involved on the one hand the establishment of the rule "free ships, free goods", and on the other the maintenance of privateering. The reception given to these proposals had hitherto been dubious, but there remained the danger that they might ultimately be accepted.

"On the other hand," as Mr. Malkin says, "the answers given to the American proposal seemed to indicate that it should be possible to obtain the abolition of privateering at the price of surrendering the right to seize enemy goods under the neutral flag, and whatever view might be held as to whether the suggested price was too heavy to pay, there could be no doubt that such a compromise would be far better in British interests than the situation which the United States were striving to bring about."²

Such an explanation would seem both logical and conclusive.

When the deed was done, it is true, a certain change in English opinion became apparent. The growth of belief in the principle of "laissez-faire" was hardly likely to lead to any strong assertion of our rights at sea, more especially as it was applied even to our relations with the Colonies—for Disraeli had not yet provided his party with an Imperialist platform. Bentham and the English utilitarians were emphasizing political liberty, until, by another channel, English thought began to approach the standpoint earlier advocated by America. The teaching of Bentham, expanded by Mill, was soon reinforced by the adoption in England of Free Trade principles. As the political views of the philosophical radicals were strengthened by the economics of the Manchester School, so English opinion became more reconciled to the abandonment of the old position. A more specious argument than that

¹ Malkin, *op. cit.*, p. 18.

² Malkin, *op. cit.*, p. 25.

of "free ships, free goods" was brought forward in the form of "the immunity of private property at sea".

Not that the arguments of Bright can be taken as representative of current opinion, particularly in Government circles. But it must be admitted that belief in the older view was declining. *Laissez-faire*, Free Trade, and the Albert Hall were all linked in the public mind with a new period of peace and prosperity, while the great controversies of the Napoleonic Wars grew daily more irrelevant and more remote.

The year 1856 then may be taken as marking the end of the long conflict regarding the relations of belligerent and neutral at sea. When England gave way the acceptance of the principles advocated by America was ensured. The latter did not, it is true, formally subscribe to the Declaration of Paris on account of the clause abolishing privateering. But a few years later the outbreak of the American Civil War forced the Government of the United States to reconsider the position. Not only did that Government find itself in the position of a belligerent while England was neutral, but also in the position of the stronger belligerent at sea. Such circumstances meant that the use of privateers was virtually, if not formally, abandoned. Practical agreement as to the principles regarding neutrality at sea had at least been reached. The later history of pre-war neutrality is chiefly concerned with attempts to define the practical application of those principles. How far those attempts were successful was shown in the last war, when bitter experience led us at last to doubt the truth of the dictum of the Prime Minister responsible for our adherence to the Declaration of Paris, namely, "that powerful countries are never vanquished by losses sustained by individuals, and that it is only by conflicts of armies by land and fleets by sea that the great contests of nations are decided".

NOTES

ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES

THE present year will see the publication of what should prove a useful accessory to the literature of international law. The Department of International Studies of the London School of Economics and Political Science (in co-operation with a number of foreign international lawyers) has embarked upon the publication, either every year or every two years, of a volume containing digests, in a form somewhat ampler than that with which the English lawyer is familiar, of all the decisions and awards of permanent interest and value given by the following tribunals : (i) The Permanent Court of International Justice and the Hague Court of Arbitration : (ii) all other international tribunals, such as the numerous Mixed Arbitral Tribunals now in operation and claims commissions, such as the British-American and the American-Mexican Commissions ; and (iii) the national courts of law of the different states of the world. The first volume will comprise the years 1925 and 1926. Thereafter it is proposed to go forward and at the same time to go back, probably as far as 1919, and publish two or three volumes covering the period 1919 to 1924. The volumes will all be based on the same classification of topics as in the case of the ordinary digest of English private law.

Those responsible for the undertaking believe that by means of it they will make more readily accessible the large mass of international case-law which is accumulating year by year and of which at present too infrequent use is made. There is more solid international law already in existence than is generally realized. The difficulty is to know of it and to get at it. (*Ralston's Law and Procedure of International Tribunals* (revised edition, 1926) is a book which contains the key to a good deal of it.) In particular is it true that the Permanent Court of International Justice has made more law than is commonly supposed. Although many of its judgments and advisory opinions are given upon the provisions of particular treaties which are of little interest except for the litigating parties, yet in arriving at its conclusions it is usually necessary for the Court to roam over a wide field of general legal principles, with the result that the judgments and opinions, as well as the proceedings, are packed full of legal material of general and first-rate importance ; for instance, *res iudicata*, admissibility of evidence relating to *travaux préparatoires* and subsequent course of dealing, the nature of servitudes, general principles of the interpretation of treaties, *res inter alios acta*, self-executing treaties, discharge of treaty owing to the other party's illegal act, &c. At present, except for those who have had the time and taken the trouble to index their reports, this legal material is not available. Nor is the need met by the recently published *First General Index of the Publications of the Court*, because, valuable as it is for other purposes, it is not a subject index of the legal material lying buried in the judgments and opinions and also in the proceedings.

The Annual Digest is being edited by Dr. Arnold D. McNair and Dr. H. Lauterpacht, with the aid of an Advisory Committee consisting of Sir Cecil J. B. Hurst and Mr. W. E. Beckett of the Foreign Office, Mr. A. Hammarskjöld, the Registrar of the Permanent Court, and Sir John Fischer Williams of the Reparation Commission. It will be published by Messrs. Longmans, Green & Co., London.

THE PROGRESS OF CODIFICATION IN 1927

THE movement in favour of the codification of international law is making progress on both sides of the Atlantic.

The Expert Committee appointed by the Council of the League of Nations in pursuance of the Assembly Resolution of 1924 had in its earlier sessions prepared and submitted to the governments of all states reports on various sections of the field of international law and had invited from those governments an expression of opinion upon these reports. In the light of the observations of the various governments the Expert Committee submitted to the Council in May, 1927, a report recommending seven subjects as being ripe for international discussion. Five of these subjects (Nationality, Territorial waters, Diplomatic privileges and immunities, Responsibility of states for damage done in their territory to the person or property of foreigners, and Piracy) were regarded as suitable for consideration by an international conference as soon as the necessary preparatory work was performed. For two others a special procedure was recommended. These two were (a) the procedure of international conferences and procedure for the conclusion and drafting of treaties, and (b) the exploitation of the products of the sea.

The report of the Expert Committee was taken into consideration by the Council at its session in June, 1927, and was the subject of a report by M. Zaleski, the representative of Poland (C. 254, 1927, V). The Council decided to transmit all the documents to the Assembly, with which body the decision was felt to lie, as both the preparatory work and the holding of a conference would entail expenditure for which it would be for the Assembly of the League to make provision.

In September the position was thoroughly reviewed by the First Committee of the Assembly. The report of this committee (prepared by M. Politis and adopted by the Assembly on September 27, 1927; C. 548, M. 196, 1927, V, p. 45) recommended that the codification of three of the above subjects (Nationality, Territorial waters and Responsibility of states for damage done in their territory to the person or property of foreigners) should be attempted at a conference to be held if possible at The Hague in 1929; that a study of the procedure at international conferences and the drafting of treaties should be made by the Secretariat, and that a study of measures for the protection of marine fauna should be undertaken by the Economic Section of the Secretariat in collaboration with the Copenhagen Council for the Exploration of the Sea.

The report of the First Committee also shows that it considered that the work in connexion with this group of subjects had then been carried as far as the Expert Committee could carry it, and that if further progress was to be made the work must be taken in hand by the governments themselves.

International law consists in great part of the practice of states, and in order to codify it there must be a knowledge of the details of that practice. Only the governments themselves are in a position to say what their practice is, and in what actions by other governments they are prepared to acquiesce. The First Committee therefore recommended, basing its proposal on the system followed in preparing for the London Naval Conference of 1907-8, that a small committee should be appointed by the Council to frame a list of the points on which governments were to be invited to supply information in connexion with each of the three subjects.

Subsequently when the government replies were received this same committee was to collate the information and frame draft articles to serve as a basis for discussion at the conference.

The Council accepted the duty imposed upon it by the Assembly Resolution, and in order to expedite the moment at which the small committee could begin its work decided to leave the nomination of the individual members of the committee to its President. A committee of five was appointed in December, 1927, consisting of Professor Basdevant (Chairman), Sir Cecil Hurst, M. Pilotti, M. François and M. Carlos Castro Ruiz.

The Committee held its first meeting in February, 1928, and framed a document indicating the points on which governments are invited to supply information. This document is now under consideration by all the governments concerned. The answers are to be sent in by October 31st.

On the American side there are two bodies dealing with the codification of international law, though they are working in close co-operation, the American Institute of International Law and the committee of jurists appointed in pursuance of the Rio Conference of 1926. The first of these bodies met at Montevideo in March, 1927, the second met at Rio in April and May, 1927.

They had before them twenty-seven of the thirty draft conventions adopted by the American Institute of International Law at Havana in 1925, two having been withdrawn and one having been transferred to the organization dealing with private international law. Fifteen of these drafts were not taken into consideration. The substance of the remaining twelve was embodied in ten of the draft instruments adopted by the meeting at Rio; two new draft instruments on "Asylum" and on the duties of states in case of civil war were also adopted. The twelve draft instruments emanating from the Rio meeting have been printed and published by the Pan American Union at Washington, and were submitted to the sixth international conference of American states which met at Havana in February of this year. The subjects of the ten draft conventions drawn up at Rio were (1) the fundamental bases of international law; (2) states: existence, equality, recognition; (3) status of aliens; (4) treaties; (5) exchange of populations; (6) interchange of professors and students; (7) diplomatic agents; (8) consuls; (9) maritime neutrality; and (lastly) pacific settlement of international conflicts.

An account of the codification work done at the Havana Conference will appear in the Year Book for 1929.

C.

THE HAGUE CONVENTIONS AND THE NULLITY OF ARBITRAL AWARDS

WHAT has been the effect, if any, of the Hague Conventions on the law regarding the nullity of an arbitral award? By Article 48 of the Convention of 1899 (in substance Article 73 of 1907):

"Le tribunal est autorisé à déterminer sa compétence en interprétant le compromis ainsi que les autres traités qui peuvent être invoqués dans la matière, et en appliquant les principes du droit international"; and by Article 54 (81 of 1907): "La sentence arbitrale, dûment prononcée et notifiée aux agents des parties en litige, décide définitivement et sans appel la contestation."

Do these articles, combined with the fact that no causes of nullity were specified

in the Conventions, mean that, for states which are parties to the Conventions, an award can never be null and void, even, for example, if the tribunal has assumed to decide a question not submitted to it?

This startling thesis is maintained in a recent article¹ by Professor A. de Lapradelle; "de ce texte" (Article 48), he says, "il suit que si l'arbitre déclare, dans sa sentence, interpréter le compromis, sa sentence est inattaquable du chef de dépassement de compétence." Such an interpretation does not appear to have occurred to other authors writing on the subject of awards since the Conventions. Hall,² for instance, says: "An arbitral decision may be disregarded in the following cases, viz., when the tribunal has clearly exceeded the powers given to it by the instrument of submission . . ."; Oppenheim³: "It is obvious that an arbitral award is only binding provided that the arbitrators have in every way fulfilled their duty as umpires. . . . Should they have been bribed, or not followed their instructions . . . the award would have no binding force whatever." Hyde⁴: "An award outside of the limits of submission is not binding, for in such case the tribunal acts in excess of its powers"; Fauchille⁵: "Les pouvoirs des arbitres sont déterminés par le compromis qui les en investit. Ils doivent s'en tenir aux points mêmes qu'ils ont été chargés de trancher. Il s'ensuit qu'ils ne sauraient, sans commettre un excès de pouvoirs, et sans que dès lors leur décision puisse être méconnue, statuer sur une question non comprise dans le compromis"; Nys,⁶ writing in 1910: "L'excès de pouvoir empêche qu'on puisse attribuer à la décision un caractère obligatoire. En effet, c'est sans droit que les arbitres ont statué; ils ont dépassé la mission qui leur a été donnée; ils n'ont pas agi comme arbitres." It is true, as Professor de Lapradelle says, that "nous ne sommes plus au temps où l'on jurait sur la parole des maîtres"; but the views quoted are entirely consistent with the character of an arbitral tribunal as a tribunal created by, and having only such powers as are conferred upon it in, an agreement between the parties. If this character has been so fundamentally altered by the Conventions, it is curious that it should not have been more generally recognized.

It is difficult to resume in a few words a very learned and ingenious argument, but Professor de Lapradelle's main points, so far as here relevant, seem to be these. *Excès de pouvoir* in an award may be a cause of *nullité*, but not of *non-existence*; the award may be set aside if the proper step is taken, but unless that is done it stands as a binding award; and it can only be set aside on a further reference to arbitration by agreement between the parties. This was the state of the law before the Hague Conferences. At the Conference of 1899 the Russian project had contained an article specifying causes of nullity (among which was included *excès de pouvoir*), but without providing for a superior tribunal before which an allegation of nullity should be brought. The Conference was of opinion that it was impracticable to devise such a tribunal, and that unless that could be done it was undesirable to specify causes of nullity; "le Comité s'est arrêté, dans l'examen de cette question, devant les inconvénients de prévoir des cas de

¹ *Revue de droit international*, 1928, No. 5, pp. 5-64.

² *International Law*, 8th ed., by Pearce Higgins, p. 420.

³ *International Law*, 4th ed., Vol. II, p. 27.

⁴ *International Law chiefly as interpreted and applied by the United States*, Vol. II, p. 158.

⁵ *Traité de droit international public*, Tome I, Partie III, p. 548.

⁶ "La revision de la sentence arbitrale", *Revue de droit international et de législation comparée*, 2^e série, Vol. XXII, p. 600.

nullité sans déterminer en même temps qui sera juge d'apprécier ces cas. On a fait observer toutefois que la Cour permanente d'arbitrage pouvait mettre les États sur la voie d'une solution dans cet ordre." (Rapport of Chevalier Descamps.) Hence Article 48 stands unqualified, with the result stated in the citation above.

This argument is vulnerable at many points. In the first place, the distinction between *nullité* and *non-existence* is intelligible in municipal law; it has never had a place in international law, and since it depends on the existence of organized judicial revising machinery it cannot be given any meaning there. In the second place, although jurists have often and justly pointed out that if an award is claimed to be null, it is undesirable that the complainant state should assume to decide the question of nullity for itself, and although agreements for a further reference to arbitration have sometimes been made by states in such a case (e.g., between U.S.A. and Venezuela in the *Orinoco Steamship Co.* case¹), there is no warrant in law for saying that unless such a reference takes place (and it can always be blocked by the side in whose favour the award has been given)² the complainant party is without remedy; it is not always true that what ought to be the law *is* the law. In the third place, the history of the Hague Conference merely shows that the Conference, deeming it impracticable to propose a satisfactory *procedure* for adjudicating on allegations of nullity, thought it best to say nothing about the *substantive law* of nullity. As the report of Chevalier Descamps shows, it hoped that when the Permanent Court of Arbitration had been instituted states would come to use it for deciding allegations of nullity. International conferences pass *sub silentio* over matters on which they are unable to agree far too commonly for it to be permissible to deduce positive, and in this case revolutionary, innovations from the omission. "Une conclusion s'impose, c'est qu'au sujet du principe de la stabilité des sentences arbitrales et des exceptions à ce principe, les règles juridiques n'ont pas été modifiées."³ As a result, "les juristes pourront donc continuer comme auparavant à enseigner que dans certains cas, quitte à déterminer lesquels, une sentence arbitrale est évidemment nulle."⁴ The presence of Article 48 in the Convention is in no way inconsistent with this view. It was clearly necessary in order to rule out the old suggestion that an arbitrator was not a judge of the issue, but a mandatory of the parties, who must refer to his principals for supplementary instructions in case of doubt regarding the interpretation of the *compromis*.⁵

It is not suggested that this state of the law is satisfactory, or that it can be final. But it is entirely consistent with the rudimentary stage that international adjudication has as yet reached. In practice also the fact that the appreciation of a cause of nullity is left to the state affected is not so grave a defect as it seems in principle. It is not easy for a state to refuse execution of an award on the ground of nullity, and instances where it has done so have been rare. The fact

¹ Scott's Hague Court Reports, p. 226.

² Cf. Professor de Lapradelle's article, *loc. cit.* at p. 35, where he says that the solution of the Hague Conference was "permettre à l'État gagnant de refuser toute espèce de pourparlers sur la question, en se retranchant derrière le caractère définitif de la sentence".

³ Nys, *loc. cit.*, p. 619, citing Mérignhac, *La Conférence internationale de la Paix*, p. 374, to the same effect.

⁴ Fauchille, *loc. cit.*, p. 565.

⁵ For this controversy see Ralston, *Law and Procedure of International Tribunals*, p. 44.

that the point is one of the many legal issues raised by the present dispute over the Hungarian Optants has given a factitious importance to this particular hiatus in international organization, and seems to be responsible for ingenious suggestions attempting to show that no such hiatus exists.

J. L. B.

THE LEGAL REMEDY IN CASE OF EXCESS OF JURISDICTION

ON January 10, 1927, the Rumano-Hungarian Mixed Arbitral Tribunal rendered a decision in which it declared itself competent to decide certain claims by owners of Hungarian nationality in respect of lands virtually confiscated as a result of a general measure of agrarian reform in Rumania applying equally to Rumanian subjects and aliens. The claims were put forward on the basis of Article 250 of the Treaty of Trianon which prohibited the application, as regards Hungarian subjects, of certain measures of liquidation. Throughout the proceedings before the Mixed Arbitral Tribunal, Rumania denied that the articles in question were relevant to claims arising out of the agrarian reform, and refused to recognize the competence of the Tribunal to deal with them. Following upon the adverse decision of the Tribunal she withdrew her national representative and adopted the attitude that the award, being given in disregard of the powers conferred upon the Mixed Arbitral Tribunal, was null and void.

The opinion that the Tribunal exceeded its jurisdiction is shared by a number of international lawyers; this also was the opinion of a committee of legal experts appointed at a certain stage of the dispute by the Council of the League of Nations. But a large body of international legal opinion is unwilling to admit that *excès de pouvoir* had taken place. The suggestion to submit this crucial question to a decision by the Permanent Court of International Justice or to the Mixed Arbitral Tribunal itself enlarged by the addition of two neutral members has, so far, proved unacceptable to Rumania.

However, even if it be admitted that the Tribunal exceeded its competence, the legal consequences of such a fact are by no means clear. The question of the nullity of the award on the ground of *excès de pouvoir* is not a new one either in the field of international arbitration or in the science of international law. Whereas Grotius and Pufendorf contented themselves with asserting the finality of the award, many modern writers, like Heffter, Bluntschli, Fiore, Pradier-Fodéré, Twiss, and Rolin, included excess of jurisdiction as one of the grounds of nullity. The Institute of International Law adopted in 1873 a *Règlement* concerning the procedure of arbitral tribunals, Article 27 of which provided that the arbitral award is null, *inter alia*, in case of excess of authority. Article 14 of the *Règlement* laid down that the arbitrators are to decide, in conformity with the provisions of the *compromis*, on the exceptions based on the incompetence of the arbitral tribunal. In the period following the Hague Conferences the scope of inquiry narrowed down to the interpretation of the relevant provisions of the Hague Conventions of 1899 and 1907.

In the field of international arbitration cases of real or alleged excess of jurisdiction were rampant before the World War, and the advisability of dealing effectively with the question was acknowledged in the course of the Hague Conference of 1899 when the question of the creation of the Permanent Court of Arbitration was discussed. However, the Russian proposal to incorporate the substance of Article 27 of the *Règlement* of the Institute of International Law was not accepted,

on the ground that there was no sufficiently authoritative and permanent tribunal to adjudicate on cases of alleged nullity. The Second Hague Conference left things substantially as they were before. The impasse created by the Rumano-Hungarian dispute acts now as a reminder that the problem still awaits a solution.

The difficulties involved in the problem lie in the existence of three rules, each of which is generally accepted in international jurisprudence owing either to its inherent soundness or to the special structure of the international system, but each of which contains germs of possible conflict with the other two. The first is that the arbitrator is competent to interpret the instrument conferring jurisdiction upon him and thus virtually to determine the scope of his competence. The second is that in doing so he must not disregard the terms of reference under which the arbitral tribunal has been created. This reservation is the expression of the principle generally adopted in private jurisprudence and applying equally to a judgment of an international arbitral tribunal, namely, that an award rendered in disregard of and going beyond the powers conferred upon the arbitrator is a usurpation of powers and legally null and void. The third is that owing to the deficient judicial organization of the international community and to the absence of an appropriate tribunal, no sanction is attached to the disregard of the second principle, and that awards of arbitral tribunals are, as a rule, final, and settle without appeal the question submitted to the arbitrator. Each of these rules, when taken by itself, appears to be sound, or at least dictated by the necessities inherent in the shortcomings of international judicial organization. When taken together, they may prove a fruitful source of conflict and of discredit for the whole institution of international arbitration. The first rule is, as we have seen, a judicial qualification of the second; it formulates one of the essential legal conditions of the validity of the award. But this condition ceases to be a legal one when its determination becomes dependent upon the will of the defeated party. A rule which renders it possible for the defeated party to disobey an adverse award hardly partakes of the character of a legal precept; a sound juridical principle is exposed to legal inefficacy and to abuse, inasmuch as it affords an opportunity for cloaking with the garb of legality an essentially law-defying disposition. But the remedy can easily be supplied by the exercise of a simple and strictly judicial function, namely, that of interpreting the *compromis*. Excess of jurisdiction may, of course, assume a variety of forms: the arbitrator may have adjudged on a matter not submitted to him, or he may have disregarded the sources of law which he was instructed to apply. In either case a judicial tribunal should be in a position to determine whether the arbitrator has disregarded the terms of reference.

This judicial tribunal now exists in the shape of the Permanent Court of International Justice which is pre-eminently qualified to decide legal questions bearing upon the interpretation of treaties. It would be of advantage and it would restrict the opportunities for wantonly defying the award of a properly constituted tribunal, if in general or particular arbitration treaties the parties would insert a clause providing that in case of alleged nullity of the award on the ground of *excès de pouvoir* the party alleging excess of authority by the tribunal shall have the right to appeal against the award by an action brought before the Permanent Court of International Justice within a specified period. Other grounds of nullity might perhaps be included in a clause of this type.

There is no reason to fear that it would be abused by quarrelsome governments intent upon obstructing the path of justice. In fact, almost all the Mixed Arbitral Tribunals instituted after the World War, including the Rumano-Hungarian Tribunal, have, in their rules of procedure, adopted provisions which allow revision of the award in one specific case, namely, the discovery of new facts. But the writer is not aware of any case of importance in which the provision has been made use of. In addition, the Permanent Court has the power to impose costs in certain cases, and Article 64 of the Statute might well act as a deterrent. Neither is there any convincing reason for restricting the insertion of such a clause to general arbitration treaties; for arbitrations taking place under general arbitration treaties are far less numerous than those held under a particular convention in which one claim or a series of specified claims is submitted to the arbitrator. The possibility of *excès de pouvoir* is equally great (or small) in arbitrations under both types of conventions. In fact, cases on record of real or alleged excess of jurisdiction arose exclusively under particular arbitration treaties.

In numerous opinions given in connexion with the Rumano-Hungarian dispute, we find once more the view that international arbitral awards are final in principle, and that the solution apparently adopted as a *malum necessarium* by the Hague Conferences should be regarded as flowing from the very nature of international arbitration. This is certainly not so. An arbitral award in municipal law is final only so far as the appreciation of law and of facts underlying the judgment is concerned. It is not final when the formal requirements of rendering justice are being violated, for instance, when the judge has proved himself guilty of corruption or of a usurpation of powers. To use the terminology adopted by continental jurists, it precludes the possibility of appeal, but not of revision. Roman law, which adhered strictly to the finality of the award, provided for an *exceptio doli* in some such cases, and the principle *extra compromissum arbiter nihil facere potest* was well recognized. In modern law, these remedies against the award of the arbitrator have been systematized by giving the state in certain cases the power to refuse its authorization for the execution of an award or to grant the right of direct action with a view to nullifying a faulty decision. Apart from the non-existence of a competent judicial tribunal, there is no reason for renouncing, in international law, the advantage of this important safeguard. There has always been a danger of international lawyers mistaking the shortcomings and deficiencies of international law and international organization for expressions of the specific and unalterable character of the international society and perpetuating them as an essential part of international law. These deficiencies can now, in regard to the question under discussion, be removed by the will of the parties. There is no justification for perpetuating them as necessary institutions of abiding value, now when there is a permanent international court in existence.

It has been mentioned that international publicists before and since the Hague Convention have been in the habit of drawing up a list of various causes of nullity following largely the grounds of nullity recognized in municipal jurisprudence. This they were perfectly justified in doing. For, notwithstanding minor differences, international arbitration and arbitration in municipal law are essentially equivalent legal institutions. In particular, they have in common the fact that the jurisdiction conferred upon them originates in the free will of the

parties to the dispute. There is no reason to credit international arbitration with an infallibility or integrity in excess of that which we usually associate with arbitrators adjudging private cases.

If the Rumano-Hungarian dispute passes away without any further advantage than that of having drawn the attention of those responsible for drafting arbitration treaties to the question dealt with in this note, then its all too long life will not have been in vain. It is better that ninety-nine arbitration treaties should contain what seems to be a superfluous and highly theoretical clause than that an international arbitral award should be disobeyed, there being a no more impartial agency to uphold such an action than the disobeying government itself invoking the legal consequences of an alleged usurpation of powers. And it would be of advantage if the value in this connexion of the Permanent Court of International Justice could be more fully appreciated. Only gradually does the community of nations realize what a powerful judicial instrument has been created in this Permanent Court of International Justice—not only an institution for disposing of individual disputes, but a high international judiciary with many, as yet unrevealed, possibilities, a solid rock upon which the international lawyer and the law-abiding statesman can set their feet in time of trouble.¹

H. LAUTERPACHT.

TERRITORIAL LIMITS IN THE BRISTOL CHANNEL

THE 'FAGERNES' CASE.

THE two following notes have been contributed on the subject of the above decision. They represent divergent views, each of which is entitled to weight.

A.

In the case of the *Fagernes* the Court of Appeal in England has decided that a particular spot in the Bristol Channel far enough to the westward for the width from shore to shore to be about twenty miles is not within the territorial jurisdiction of the Crown.²

This pronouncement may be considered from two different aspects, that of English municipal and that of public international law, though the decision is a declaration of the former only. It does not necessarily follow that every part of the seas under the sovereignty of the King in international law is also in English law within the jurisdiction of his courts. In *R. v. Keyn* the majority of the Court

¹ The following is a selection of works dealing wholly or in part with excess of jurisdiction: Pradier-Fodéré, *Droit international public européen et américain* (1894), VI, s. 2628; Fiore, *Nouveau droit international public* (translation) (1885), II, s. 1215; Hyde, *International Law* (1922), II, s. 582; Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten* (1907), pp. 347–73; Lammach, *Die Rechtskraft internationaler Schiedssprüche* (1913), pp. 129–50, 167–209 (a classical exposition of the subject); Ralston, *The Law and Procedure of Arbitral Tribunals*, revised edition (1926), ss. 53, 54; Goldschmidt in *Revue de droit international et de législation comparée*, VI (1874), pp. 446–52; Castberg, *ibid.*, 3rd ser., VI (1925), pp. 342–8; Scelle in *Revue générale de droit international public*, XVIII (1911), pp. 185–202, and XXXIV (1926), pp. 449–56; Fleischmann in *Ostrecht*, II (1928), pp. 277–83; Schücking, *ibid.*, pp. 169–75; Verdross in *Zeitschrift für öffentliches Recht*, VII (1928), pt. 3; and Lapradelle in *Revue de droit international*, II (1928), pp. 5–64 (the best recent discussion of the question of excess of jurisdiction.)

² For a summary of this case see *infra*, p. 174.

held that the portion of the sea within three miles from the coast had never been placed under the jurisdiction of the English courts, though it is perhaps now safe to say, from the more or less general acceptance of the *Territorial Waters Jurisdiction Act*, that in international law they were under the King's jurisdiction.

There is, however, a strong presumption in favour of the contrary proposition that no waters, which in international law are outside His Majesty's jurisdiction, are by English law within the jurisdiction of his courts. If there were any such waters, a potential source of international trouble would exist, and the courts are therefore fully justified in their practice of interpreting English law, where it is doubtful, in the light of international law.

Whether one is approaching the matter from the point of view of English or of international law, it is necessary, in considering parts of the sea, to distinguish clearly between "national" waters (or inlets *intra fauces terrae*) and the marginal belt of territorial waters which surrounds both the land and the national waters. In both systems of law the former are more closely assimilated to land territory than the latter. In English law "national waters" have from the earliest times been included "within the body of the counties which they adjoined" and therefore within the jurisdiction of the courts of common law, whereas (according to the decision in *R. v. Keyn*), the territorial waters were never within the jurisdiction by common law and they were only brought within it by statute in 1878. Territorial waters have not yet been brought within the body of any county, and it has never been decided whether the *Territorial Waters Jurisdiction Act* includes civil as well as criminal processes, or, to put it in another way, it has not been decided whether that Act operates as a reversal of *Harris v. Owners of the Franconia* (1877, 2 C.P.D. 173) as well as of *R. v. Keyn* (1876 2 Ex.D. 63).

From the point of view of international law the agreement of the Attorney-General, appearing on behalf of the Crown, and of all three members of the Court on the following points is of considerable interest :

- (1) Bays of which the entire land boundaries form part of the territory of the same state and of which the entrances do not exceed six miles in width, are, in international law, national waters, and part of the territory of that state.
- (2) Bays with wider entrances may be national waters if there is evidence of an appropriation by effective occupation and dominion on the part of the littoral state in respect of them.
- (3) There is no recognized general rule of international law under which bays with wider entrances than six miles can be claimed as national waters.
- (4) The modern tendency is to narrow the limits of national waters.

Claims to inlets coming under (2) are of course really based on prescription, i.e. upon age and general acquiescence ; such for instance was the international justification for the claim recognized in the *Conception Bay* case.

W. E. BECKETT.

B.

In the *Fagernes* [1926], P. 185, Mr. Justice Hill decided that the waters of the Bristol Channel west of a line drawn from Bull Point to Port Eynon Head, where the Channel is about twenty miles across, were within the *fauces terrae*, i.e. within the jurisdiction of the English Courts. The facts of the case appear at p. 174, and need not therefore be repeated here. The defendants, an Italian corporation, owners of the *Fagernes*, appealed, and at the hearing, upon the

statement of the Attorney-General, the decision of Mr. Justice Hill was reversed by the Court of Appeal.

At the hearing, after the close of the arguments, the Attorney-General was asked by the Court whether the Crown did or did not claim that the place where the collision took place was within the realm of England. The Attorney-General replied that the Secretary of State for Home Affairs instructed him to say that "the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends". It was held by Atkin and Lawrence L.JJ., that this statement was binding on the Court, but it was held by Bankes L.J. that the Court was not necessarily bound to accept the information of the Crown as conclusive. He also held, however, that in the absence of authority and in view of the general trend of modern jurists to limit the width of the *fauces terrae* within which territorial sovereignty was claimed, the Court ought to be guided by the information given by the Attorney-General to the extent of saying that they did not consider there was sufficient authority for supporting the judgment of Mr. Justice Hill. On the other hand Lord Justice Atkin disclaimed any responsibility save that of treating the statement of the Crown as conclusive. He declared that if he had to decide this case upon the materials before Hill J. and the further authorities brought before the Court of Appeal, he would have been inclined to come to the same conclusion as he did. The Lord Justice (now Lord Atkin), with his usual keen discernment, laid his finger upon the real question in issue, when he cited a passage from the award in the North Atlantic Coast Fisheries Arbitration to which I shall presently refer.

The *Fagernes* case has raised questions not only of municipal and International law, but also of constitutional law and public policy. Dealing first with the municipal law we may note that although certain waters had been regarded as within the realm from very early times, it was James I who, by an order in 1604, defined the King's Chambers for purposes of neutrality and jurisdiction. These chambers were formed by a line drawn from headland to headland all round the coast. Thus the Bristol Channel was enclosed by a line from Land's End to Milford, a distance of nearly 100 nautical miles. As Lord Atkin pointed out, the claim to treat these chambers as territorial waters was maintained by Sir Leoline Jenkins in prize cases from 1665 to 1675. It was also admitted by Lord Stowell in 1801 and by Sir Robert Phillimore in 1871 who said that "Great Britain had immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of the sea cut off by lines drawn from one promontory to another and called the King's Chambers". In *Cunningham's* case¹ it was not necessary to determine what was the entrance to the Bristol Channel, but the Court did hold that "the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded".

This, said Lord Blackburn, in delivering the judgment of the Privy Council in the *Conception Bay* case² in 1877, pointed to the headlands in Pembroke and Hartland Point in Devonshire as being the *fauces terrae* of that arm of the sea. This much was determined, that a place in the sea, out of any river, and where the sea was ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words, within the territory of Great Britain. It

¹ 2 Bell, C.C. 72.

² *Direct United States Telegraph Co. v. Anglo-American Telegraph Co.* L.R. 2 App. Cas. 394.

also shows that usage and the manner in which that portion of the sea had been treated as being part of the county was material and this was clearly Hale's opinion, as he says not that a bay is part of the county, but only that it *may* be. "Passing to the law of nations", Lord Blackburn added, "we find an universal agreement that harbours, estuaries and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is a 'bay' for this purpose". Conception Bay is fifteen sea miles between the headlands and penetrates between forty and fifty miles. Upon the grounds that the British Government had for a long period exercised dominion over this bay, that their claim had been acquiesced in by other nations, and that the British Legislature had by legislation declared it to be part of British territory, it was held to be within the territorial waters of Newfoundland. In the *Moray Firth* case,¹ decided in 1906, Lord Guthrie held that the Moray Firth within the headlands of Duncansby Head and Rathay Point, a distance of 73 miles, was within the territorial waters of Scotland. It is not, he said, the high seas, but a bay between the jaws of the land "which has been called in England one of the King's Chambers". Upon appeal Lord Kyl-lachy said that the Firth seemed to him to be *prima facie* a bay of well-marked headlands and penetrating far into the heart of the country. While admitting that in the width at the mouth and in general configuration it was larger than most "bays" properly so-called, he considered helpful the analogies of the Bristol Channel and the Firths of Clyde and Forth. And Lord Salvesen declared the Moray Firth to be undoubtedly "geographically *inter fauces terrae*".

The same conclusions were reached in *Annaumara Pillai v. Muthupayal*,² decided in 1904. Palk's Bay, which was within the Gulf of Manaar, was on appeal to the Appellate Criminal Division of the High Court of Madras found to be an arm of the sea "landlocked by H.M.'s Dominions for eight-ninths of its circumference", to have been effectively occupied for centuries by the inhabitants of the adjacent districts of India and Ceylon respectively; such occupation having been enjoyed with the acquiescence of other nations; consequently it was an integral part of H.M.'s dominions. It was further observed that, had the chank beds lain in the Gulf of Manaar, the conclusion of the Court would have been the same, that body of water being deemed a territorial bay for the same reasons. The Court also relied on the analogous *Conception Bay* and *British Channel* cases. The claim to territorial jurisdiction by Queensland over the waters lying within the Great Barrier Reef, frequently more than a hundred miles out to sea, and to which no exception has been taken by foreign Powers, may equally be noted. It is also significant that the King's Regulations and Admiralty instructions for 1899 declared that territorial waters include the ports, harbours, bays, mouths of rivers and adjacent parts of the sea enclosed by headlands belonging to the same state. This declaration was dropped in the 1906, 1913, and 1926 editions.

It may also be noted that the whole of the Bristol Channel east of Lundy Island is a pilotage district, and still in parts a compulsory pilotage district. Compulsory pilotage is usually only compulsory within territorial waters. In his judgment Lord Atkin attached importance to the fact that Lundy Island, twenty miles westwards of the scene of the collision, is part of Devonshire.

¹ *Mortensen v. Peters*, 8 F. 93; 43 S.L.R. 872.

² I.L.R. 27 Mad. 551 (1903).

The American decisions are to the same effect as the British. In *The Alleghanean* (Scott's *Cases on International Law*, 232), decided in 1888, the Court concluded its opinion by the following passage: "Considering the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart; that it and its tributaries are wholly within our own territory; that the boundary lines of adjacent states encompass it; that from the earliest history of the country it has been claimed to be territorial waters; that it cannot become the pathway from one nation to another, and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the United States and no part of the 'high seas' within the meaning of the term as used in s. 5 of the Act of June 5, 1872." The same principles were applied in *Manchester v. Massachusetts* (1890), 139 U.S. 240, Sup. Ct. 559, and *Shively v. Bowlby* (1893), 152 U.S. 1, 14 Sup. Ct. 548.

Turning to the practice of states, the three-mile rule has never been strictly nor systematically applied to landlocked bays. When the distance between headlands exceeds six miles there is no agreement what limit should be imposed. Some jurists and publicists suggest 10, some 12 miles. This is probably what Lord Justice Bankes was referring to when he said: "It is common ground from the point of view of international law that no agreement in the question has been reached." There is, however, general agreement that dominion *may* extend over arms of the sea, bays, gulfs, estuaries and harbours, which are bounded, but not entirely enclosed, by lands belonging to one and the same state irrespective (within limits) of the distance between the headlands. In addition to the instances already cited may be mentioned the French claim to Cancale Bay, the entrance to which is 17 miles; the Norwegian claim to the Varanger Fiord, which is 32 miles; the British claim to the Bay of Chaleurs, which is 16 miles, to Miramichi Bay, which is 14½ miles, and to Hudson Bay, which is over 100 miles. Norway also claimed in *The Lökken*¹ as territorial waters a distance of three miles from a line drawn between The Naze and Rauna Island, about thirteen miles in length. Sir Samuel Evans P., both parties having agreed to the three-mile limit for the purposes of the case, adopted the view that the bay should be measured from headland to headland. The Judicial Committee agreed with the President on these questions. So too, the United States have successfully asserted their claim to include in their territorial waters Delaware Bay, which is 18 miles; Cape Cod Bay, which is 32 miles; Monteret Bay, which is 19 miles, as well as other inlets of a similar kind.

This proposition is supported by the great majority of international jurists. Their opinions are collected in the *North Atlantic Coast Fisheries Arbitration*² of 1910 and were approved by the majority of the arbitrators. In his argument before the tribunal the British Attorney-General, Sir William Robson, said: "It is also undoubted law that a state can exercise sovereignty over certain portions of the sea enclosed within its territories by headlands or promontories." Different considerations, he argued, apply in the case of enclosed waters. Headlands give a greater power of control and the safety of the state necessitates a more ex-

¹ 9 LL. R.P.C. 17 n. (1918).

² Scott, *Hague Court Reports*, p. 141.

tended dominion. Moreover, they lie off the ocean highways. Consequently the three-mile rule has never been applied to them. No doubt, some restrictions on the exercise of sovereignty has been enforced over waters which from their size or configuration cannot be effectively controlled, or which from their situation cannot be fairly held to be the exclusive property of any one state. But these restrictions must depend on the particular circumstances of each case. In support of this contention the Attorney-General relied on the precedents of the American claims over Delaware and Chesapeake Bays, and on the British claims to St. George's Channel, the Bristol Channel, Conception Bay, the Bay of Chaleurs and Miramichi Bay. At this moment, therefore, the British Government was claiming as territorial waters not only the Bristol Channel, but St. George's Channel as well.

In the course of Senator Root's argument he was asked by the President when the pretensions of Great Britain concerning the King's Chambers were abandoned. Senator Root was only able to reply that the best view of that subject to be obtained would be in the opinions of the judges in the *Queen v. Keyn*. Sir William Robson then intervened to assert: "They have never been abandoned. The claims of Great Britain to the King's Chambers stand perfectly good. There was nothing in the *Queen v. Keyn* to diminish or retract those claims."

In their award the majority of the arbitrators held that "in case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast". The Tribunal declined to say what constituted a bay. It was easy to determine specifically, but difficult to describe generally. Each bay must therefore stand as it were upon its own bottom. "The interpretation" of the term "bay", they said, "must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the state in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea, and other circumstances not possible to enumerate in general." And since it had been found impracticable to define the term "bay" they recommended that the parties in the future should adopt the ten-mile limit in every bay not hereinafter provided for. These recommendations, in so far as they related to bays contiguous to the territory of the Dominion of Canada, with the exception of Hudson Bay, were embodied in the Treaty of Washington, July 20, 1912, between the British Empire and the United States. This treaty does not appear to have been ratified by either of the parties.

Since there is no evidence that until the hearing in the Court of Appeal of the *Fagernes* case the Crown had abandoned its claim to the Bristol Channel a serious question of constitutional law arises. Can the Crown, by the mouth of the Attorney-General, deprive the subject of his rights under the existing law? Assuming that at the time of the collision the *Fagernes* was within the jurisdiction of the British courts, the British owners were entitled to take proceedings, and, if successful, to recover damages limited to £8 a ton. If the *Fagernes* was not within such jurisdiction, the British owners could only take proceedings in the Italian courts, and, since the *Fagernes* was sunk, by Italian law the British owners

could not recover any damages at all. Thus the action of the British Government has deprived not only British subjects of their former rights in the future, but also British subjects of their existing rights by *ex post facto* action. I venture to think that only Parliament is entitled to do the former, and not even Parliament would pass such retrospective legislation in the case of the latter.

I understand that the motive of the Admiralty for abandoning the claim to the Bristol Channel and other inland waters is that the nation which possesses the command of the sea is in a more favourable position if territorial waters are restricted as much as possible. As Mr. Jessup says, "the wider the ocean, the wider the power of him who controls it". This may be true up to a point, but wide and shallow bays such as the Bay of Biscay are in quite a different category to narrow and deep inlets of the sea such as the Bristol Channel and the Moray Firth. I doubt whether this indiscriminate policy will commend itself to India and the Dominions, and the Admiralty itself may be embarrassed in its development of Singapore as a naval base.

HUGH H. L. BELLOT.

THE PRINCIPLE OF "PERSONAL" LAW

SOME RECENT DECISIONS.

WESTLAKE and Dicey, the greatest English writers on private international law, maintained that the principle that matters of status and capacity were governed by the personal law of the individual was the soundest and most conducive to the logical development of private international law. The principle had the further merit, as these writers pointed out, that, if accepted in English law, it would tend to harmonize it with the conceptions prevailing on the Continent. Closely connected with this principle of the choice of law is another, that in cases where the issue to be decided is one of status, the courts of the country whose law is the personal law have exclusive jurisdiction. The expression "personal law" of course covers the difference of view as to what is the personal law—the law of the nationality or that of the domicile.

It is remarkable how far recent decisions of the two highest appellate tribunals in this country have gone in the direction of establishing these principles which are so interwoven that arguments are always based on one in favour of the other and *vice versa*.

Their history goes back, of course, to the very beginnings of private international law in the Middle Ages, and the controversies relating to real and personal statutes. The principle of the competence of the personal law in matters of status has taken deep root in most continental systems of law. In English law it has had a hard fight for recognition. It began badly, being strongly criticized by Story, and there were few signs of its recognition in the English courts in the middle of last century. The first attempt at general recognition was the case of *Sottomayer v. de Barros*, No. 1, when the Court of Appeal, in 1877, declared that it was a generally accepted principle that in matters of capacity the law of the domicile applied. This declaration was ahead of its time and at once met with criticism and was cut down severely by the Court of Appeal itself two years later in *Sottomayer v. de Barros*, No. 2. The next step forward was in 1895, when the House of Lords laid it down in *Le Mesurier v. Le Mesurier* that in matters of divorce the Courts of the domicile were exclusively competent, and supported

this by statements that in matters of status the law of the domicile should apply.

Another set-back, however, took place in 1908 when the Court of Appeal in *Ogden v. Ogden* again subjected the principle, as one of general application, to severe criticism, and held that it did not apply in suits for nullity of marriage. The principle was, however, again affirmed by the House of Lords and the Privy Council in two recent cases, *Lord Advocate v. Jaffrey* and *The Attorney-General for Alberta v. Cook*, both cases dealing with divorce, where two exceptions to the rule that the courts of the domicile have exclusive jurisdiction in divorce, which had been supposed to exist, were overruled. In *Salvesen v. Administrator of Austrian Property*, reported in 1927, the House of Lords affirmed the jurisdiction of the courts of the domicile to make declarations of validity or nullity of marriage on the ground that these were judgments in matters of status and matters of status belonged essentially to the courts of the domicile. But the full importance of the decision lies in the general recognition, as a matter of principle, of the exclusive competence of the law and courts of the domicile in matters of status.

The best way to appreciate the development which has taken place is to compare a passage in the judgment in *Ogden v. Ogden* in 1908 with an extract from the speeches in the House of Lords in this case. Sir Gorell Barnes in 1908 said :

“The argument on behalf of the appellant appears to be based upon views which have been expressed by foreign jurists but which have not been adopted in this country, where the English courts have not been very ready to admit a personal law of status and capacity dependent on domicile and travelling with the person from country to country, though there has been, perhaps, less unwillingness in later years to give effect to the *lex domicilii* to some extent.”

Lord Phillimore in 1927 says :

“It is established that the law of England recognizes the competence and the exclusive competence of the court of the domicile to decree dissolution of marriage. . . .

“As to the general principles of international law upon this subject as viewed by the British courts, it seems to me pretty clear that for the purpose of pronouncing upon the status of parties as well as for the purpose of affecting that status, the court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively. I have used the expression ‘the law which determines the personal status’ because there are countries which would refer to nationality rather than to domicile, but the principle is the same. The text first quoted in *Shaw v. Gould* and then cited in *Le Mesurier v. Le Mesurier* and in *Lord Advocate v. Jaffrey* was not, I apprehend, intended to be confined to decrees which effect something but deals also, if not primarily, with decrees which decide upon the existing status. *Quum de statu et conditione hominum quaeritur uni solummodo iudici et quidem domicilii universum in illo ius est attributum*. My Lords, there is no reason for supposing that the law of Scotland differs in this respect from general international law.”

Lord Haldane expresses the same view in terms which are hardly less categorical.

ARBITRATION AND CONCILIATION

THE recent discussions on the subject of arbitration and conciliation so often show a confusion of ideas as to their nature and their place in the scheme of the League of Nations that it may be well to draw attention to certain elementary distinctions. It would greatly conduce to clear understanding by the public, and perhaps even by politicians, of the whole question of the pacific settlement of international disputes if the distinction between arbitration and conciliation were scrupulously preserved in speaking and writing on the subject and the tendency to lump these and other methods under the all-inclusive description of arbitration were abandoned.

Arbitration is a process whereby a dispute is submitted to a tribunal by consent of the parties for *decision*. It involves the acceptance by the parties of the decision or award irrespective of whether their representatives, if any, on the tribunal have agreed to it. Conciliation or mediation, on the other hand, consists in the discussion by the representatives of the parties to a dispute in conjunction with other neutral persons with a view to arriving at an agreed solution. The commission entrusted with this task may be set up in advance or constituted *ad hoc*, but in either case it has no power to take a decision or bind the parties without their consent. In the words of the Locarno agreements its task is "to elucidate questions in dispute, to collect with that object all necessary information and to endeavour to bring the parties to an agreement". If no agreement is reached its powers are at an end. It is obvious, therefore, that arbitration and conciliation are two different and distinct things, both in method and result.

Inquiry and report by the Council under the Covenant of the League is a third method differing from both, and in a sense midway between them. When a dispute is submitted to the Council under Article 15 of the Covenant its first duty is to act as a mediator. "The Council shall endeavour to effect a settlement of the dispute, and, if such efforts are successful, a statement shall be made public, giving such facts and explanations regarding the dispute and the terms of settlement as the Council may deem appropriate." This is conciliation pure and simple with the added right and obligation to make a public statement. But the procedure is not limited to this "endeavour to effect a settlement". If the dispute is not thus settled the Council still has duties to perform. It is bound to make and publish a report containing a statement of the facts and recommendations, and if this report is agreed to by all the members of the Council other than the parties to the dispute the recommendations impose an obligation upon the parties notwithstanding that they have not consented to those recommendations. This is clearly something more than conciliation. The obligation does not amount to the duty of accepting and carrying out the recommendations—that would be arbitration. But it is an obligation not to go to war with any party to the dispute which complies with the recommendations.

The difference between an arbitral award and such recommendations of the Council is that in regard to the former there is a positive legal obligation to comply, whereas in regard to the latter there is a negative legal obligation to refrain from going to war with a party which complies. But inasmuch as non-compliance with the recommendations opens the door to war, compliance is a strong moral obligation. A further point must be noticed: the phrase "any party to the dispute which complies with the recommendations of the report" includes a successful as well as an unsuccessful party, so that it is possible for a

state to obtain protection from war under Article 15 by merely acquiescing in favourable recommendations.

There are, of course, loopholes in this system—the famous “gaps” in the Covenant—and they are two in number: (1) the Council may not be able to agree upon a report unanimously (not counting the parties); (2) one party or both parties may reject the recommendations even if they are arrived at unanimously by the other members of the Council. With regard to the first point the history of the Council's proceedings is instructive. In the eight years of the League's existence the Council has dealt with a large number of disputes of the most varied character, difficulty, and importance. The actual number is not far from fifty. But there is no single instance of a breakdown due to the impossibility of achieving the qualified unanimity required under Article 15. By negotiation, discussion, compromise and the adoption of various expedients the members of the Council have been able to reach agreement, often including the parties to the dispute, but always among the other members. The recommendations and resolutions so adopted may sometimes have been questionable from the point of view of principle, but this is the very reason which in certain cases led to their being adopted by both sides. The first gap is necessary to give the required weight and flexibility to recommendations for the settlement of political disputes.

As to the second point, it must be remembered that even a binding decision or arbitral award depends for its effect in last analysis upon the willingness of the parties to carry it out. Under the Covenant as it stands there is a strong inducement to comply with the recommendations of the Council and so obtain the benefit of the undertaking by the other party to refrain from war and of the sanctions consequent upon a breach of that undertaking. In almost every case this inducement must prove irresistible to one of the parties to the dispute, either because the recommendations are favourable to it, or because it is too weak by comparison with the other state to risk war. But there are two unpleasant possibilities, the one less, and the other more, remote: (1) the party in regard to which the recommendations are unfavourable may, whilst not resorting to war, simply ignore them. As things are at present such a course would not be contrary to the terms of the Covenant, and, therefore, involves no sanctions. (2) Both parties might reject the recommendations. This is extremely unlikely, but it is conceivable where the parties in dispute are evenly matched and the recommendations of the Council so nicely balanced as to give insufficient satisfaction to either of them. Possibility No. (1) could be met by an amendment of the Covenant giving binding force to “unanimous” recommendations, and such an amendment would go some way to meet possibility No. (2) as well, though the application of effective sanctions in such a case would, especially if the parties went to war, be very difficult.

A. P. FACHIRI.

RETURN OF ALIEN ENEMY PROPERTY BY THE UNITED STATES

By an Act of Congress approved by the President in March, 1928, provision is made for the immediate return to their owners of 80 per cent. of German property now held by the Alien Property Custodian. More than \$500,000,000 of enemy property (including some belonging to American citizens and nationals of allied and neutral countries erroneously seized) found its way into the hands of the Custodian during the war. By an Act of March 4, 1923, all parcels of such

property not exceeding \$10,000 in value were returned to their owners. As a result of this legislation and the return of property erroneously seized, the aggregate value of the property now held by the Custodian is estimated at \$270,000,000, a sum exceeding by about \$14,000,000 the total estimated awards, made or to be made by the Commissions, against Germany, Austria, and Hungary.

The Act contains several other features that may be noted. First, it provides for the assumption by the United States of immediate payment in full of the claims of American nationals against Germany not in excess of \$100,000, or in respect of death or personal injury, and for the payment in the immediate future of 50 per cent. of the claims of German nationals for merchant vessels, patents, and radio stations seized by the United States, and the remainder in instalments.¹ Second, it provides for the creation of a "special deposit fund" from which the above payment will be made, except that the return of 80 per cent. of German property will be made from the funds now in the hands of the Alien Property Custodian. The "special deposit fund" will be composed of 20 per cent. of the German property to be temporarily detained by the Custodian (estimated at \$40,000,000); the German share of the unallocated interest fund (estimated at about \$25,000,000), payments received from Germany under the Paris Agreement (\$23,000,000 now in hand plus \$10,700,000 annually hereafter), and an appropriation to be made by Congress to cover the value of German ships, patents, and radio stations seized by the United States. Third, the Act provides for the return in full of all property belonging to Austrian and Hungarian nationals now held by the Custodian, as soon as the Austrian and Hungarian Governments have paid to the United States a sum sufficient to cover the awards of the Tripartite Claims Commission in behalf of American nationals.² The Act further provides that the payment of awards to the United States on its own behalf (estimated at \$41,700,000) shall be postponed until all private claimants have been paid in full. It was urged in behalf of certain corporations in Switzerland that *all* the property of neutral corporations should be returned at once, but the proposal was rejected and the Act provides that their property shall be returned in the same manner as that belonging to enemies.³

The committee which reported the Bill declared that it was unanimous in the opinion that the private property of enemy nationals should not be confiscated by the United States for the payment of the debts of enemy Governments.

J. W. GARNER.

¹ By the terms of the Act, the total amount to be paid Germany for ships, patents, and radio stations seized is not to exceed \$100,000,000. An arbiter is to be appointed to hear and determine the claims of German nationals under this head and to make awards covering the value of the ships, patents, and radio stations.

² See p. 165.

³ The Supreme Court in the case of *Behn, Myer & Co. v. Miller* (266 U.S. 457) held that ownership of the shares of an enemy corporation did not necessarily make the corporation an enemy concern within the meaning of the Trading with the Enemy Act. But it also held that a corporation organized in a neutral country might be an enemy corporation if it was doing business in Germany as the Swiss corporations, on behalf of which the proposal was made, were actually doing: *Swiss National Insurance v. Miller* (267 U.S. 42).

THE CASE OF THE *LOTUS*

THE decision of the Permanent Court of International Justice in the case of the *Lotus*¹—the first decision of the Court on what may be said to be a question of general international law—is of such importance as fully to justify the considerable amount of comment which it has received. There has, however, been a tendency to draw inferences as to the effect of this decision which are wider than the judgments delivered really support. The decision itself is simply, in the first place, a recognition of the validity in international law of a doctrine which Mr. J. B. Moore, in his *Digest of International Law*, called “objective territorial jurisdiction”, and in the second place, an application of this doctrine to the collisions of two ships of different nationalities occasioned by the criminal negligence of the navigating officer of one of the vessels and producing loss of life among persons on board the other vessel.

The doctrine of objective territorial jurisdiction simply comes to this, that a crime can be held to be committed in the country where it produces its effects, although the criminal was not, at the time of its commission, corporally present in that country, and that the principle of territorial jurisdiction, under which a state has jurisdiction to punish all persons, whether nationals or foreigners, committing crimes in its territory, applies to crimes which produce their effects upon its territory though committed by persons who, at the time of the commission of the offence, were outside the territory.

In the judgment of the Court, in which one-half of the judges concurred, the validity of this doctrine is based upon the practice of a very large number of states as evidenced by provisions in their criminal codes or decisions of their tribunals, including a number of decisions of English and American courts, and so far as the affirmation of the principle is concerned the opinion of the Court is reinforced by the opinions of most of the judges who dissented from the decision. Judge Moore indeed delivered by far the strongest opinion in favour of it, and stated that there “does not exist to-day a law governed state in the jurisprudence of which such a right of punishment is not recognized”. Judges Nyholm and Loder also accepted the principle, but the latter stated that he thought it was a legal fiction which was justified only in the case of crimes which were committed intentionally. Lord Finlay does not appear to have rejected the principle, but based his decision on the ground that it did not apply to this case. Judge Weiss alone repudiated the principle *in toto*; Judge Altamira does not appear to have discussed the point at all. The doctrine is, therefore, recognized in principle by a majority of nine judges to one—three judges expressing no opinion upon it.

So far as the validity of this principle is concerned English or American lawyers are, indeed, in view of the practice of their respective courts, hardly in a position to dispute it.

To turn to the second question, namely whether the principle was correctly applied in this case. The Court and Judge Moore (i.e. by a majority of 7 to 5) held that it did apply. Lord Finlay and Judges Loder and Nyholm held that it did not apply for different reasons which are discussed below. The Court held that the effects of Lieutenant Demons’ negligent navigation when he was standing on the bridge of the *Lotus* were produced on the Turkish vessel, which the *Lotus* sank, and that as persons who were on board the Turkish vessel were drowned Lieutenant Demons could be said to have committed the crime of man-

¹ The facts of this case will be found stated *infra* at p. 139.

slaughter on the Turkish vessel, and that Turkey had jurisdiction over crimes committed by foreigners on a Turkish vessel.

One objection which was raised to the application of this principle to the facts of this case is based upon the view that although intentional crimes may be said to be committed in the place where they take effect, even if the criminal is elsewhere, on the ground that the intention follows the act and extends to its consequences, this does not apply to crimes of manslaughter for the reason that there is no intention to produce any effects anywhere. Judge Loder based his dissent on this view.

There are two American cases in favour of the application of the doctrine of objective territorial jurisdiction to crimes of manslaughter; on the other hand all the English precedents in its favour relate to intentional crimes, and in the only English case where it was considered with regard to manslaughter, namely the case of the *Franconia*, the Court, by a majority of eight to four judges, held that it did not apply. Cockburn C.J. expressed the view of the majority and Denman J. that of the minority. The Permanent Court were of the opinion that there was no ground for making any distinction in this matter between crimes of intention and crimes of negligence, and Judge Moore argued very strongly against any such distinction. So far, therefore, as any opinions were expressed upon the existence of this distinction between intentional crimes and crimes of negligence, the majority against the existence of any such distinction was seven to one.

A second argument against the application of the doctrine in this case was that it was excluded in the case of acts (1) committed by foreigners when in a foreign ship, and (2) in connexion with the navigation of a foreign ship, by a customary rule of international law under which the exclusive jurisdiction of the flag state is recognized. The Court (and Judge Moore) were of opinion with regard to (1) that there was no ground for the view that the jurisdiction of the state of the flag over its ship on the high seas was any higher or more exclusive than the jurisdiction of a state over its territory, and with regard to (2) that no such customary rule had been proved. On the second point Judges Loder, Weiss, and Altamira (and perhaps also Lord Finlay) were apparently of the opinion that this customary rule existed.

The third argument for the non-application of this doctrine in this case was that a Turkish ship on the high seas was not, in the matter of jurisdiction, so completely assimilated to Turkish territory that the doctrine of objective territorial jurisdiction applied to acts producing their effects on such a ship in the same way that it might apply to acts taking effect on Turkish territory. This was the ground adopted by Lord Finlay, who said:

“A ship is a movable chattel, it is not a place; when on a voyage it shifts its place from day to day and from hour to hour, and when in dock it is a chattel which happens at the time to be in a particular place. The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships. It appears to me to be impossible with any reason to apply the principle of locality to the case of ships coming into collision for the purpose of ascertaining what court has jurisdiction; that depends on the principles of maritime law.”

The Court and Judge Moore thought that the analogy of a Turkish ship on the

high seas to Turkish territory, so far as questions of jurisdiction were concerned, applied completely.

The fourth argument against the decision of the Court on this point was based on the ground that it had not been proved that all the elements necessary to complete the crime of manslaughter had taken place on board the Turkish ship, seeing that it was unknown whether the persons on board had perished actually on the ship or whether they had gone overboard before they were drowned. This argument recalls the technical difficulties of venue in cases of manslaughter and murder in the old days in English law. Judge Nyholm relies on this ground in his dissenting opinion and Judge Weiss also mentions it as a difficulty in the way of those who would apply the principle to this case. The Court and Judge Moore were of the opinion that it was sufficient to render the doctrine applicable if some substantial part of the effects of the criminal act took place upon the ship. Again, so far as this point is concerned, the opinions expressed are in favour of the judgment by a majority of seven to two.

The Court refrained from giving any opinion upon the questions whether the jurisdiction of Turkey in this case could be supported independently either (1) on the ground that an injury to Turkish nationals had been committed, or (2) on the ground that the criminal conduct of the French officer on the *Lotus* was so connected and bound up with the conduct of the Turkish navigating officer in the Turkish ship that it was necessary that they should be tried jointly and that the trial of Lieutenant Demons in Turkey at the same time as the Turkish captain was justified on the grounds of *connexité*. On the former of these points Judge Moore differed from the Court in that he thought that it was necessary to decide it for the reason that Demons had been tried in fact under an article in the Turkish code by which jurisdiction was claimed on this ground. He then considered this question and expressed the opinion that jurisdiction over foreigners could not be justified in international law upon this ground. Judges Loder and Nyholm and Lord Finlay were of the same opinion. Judge Weiss expressed a view the effect of which it is rather difficult to follow. He says that this theory of jurisdiction is one "which is not itself contrary to international law but is outside international law". On the second point, *connexité*, Judge Loder was of the opinion that there was in fact no *connexité* between the acts of Lieutenant Demons and of the Turkish captain. "Simultaneousness was not the same thing as *connexité*, but he held that in any event *connexité* could not be relied on as a ground of jurisdiction; it only determined the application of a convenient rule under which two cases could be tried together *when the judge had jurisdiction over both*. Judge Weiss expressed a similar opinion.

So far, therefore, as these two alternative grounds on which Turkey based her claims to jurisdiction are concerned, the position created by the judgment of the Court is this, that no opinion has been expressed in favour of them but six judges have held that they are invalid, for it was necessary for the judges who held that Turkey had no jurisdiction to reject all the grounds on which she claimed it.

So much for the actual decision in the case. It is, however, certain passages in the judgment of the Court rather than the decision itself which have given rise to most questionings. The Court does appear in these passages to commence its consideration of the case from the standpoint that a state has the right to do anything which is not in contravention of an express and defined rule of international law; that therefore it is entitled to exercise any jurisdiction unless a

rule of positive international law can be found prohibiting it ; that there is no positive rule of international law (subject to certain exceptions) against the exercise of jurisdiction in the territory in respect of persons, property or acts outside the territory ; that on the contrary the general rule is that there is jurisdiction and that any exceptions to it must be based on what can be proved to be rules of positive international law. This, the Court states, is the question as regards jurisdiction in general, both civil and criminal. When they came to deal with criminal law in particular, the Court did not give any expression of opinion as to whether there was or was not a positive rule of international law limiting the right of a state to exercise criminal jurisdiction over foreigners to territorial jurisdiction (i.e. to subjective and objective territorial jurisdiction) though their reasoning at least suggests a doubt as to their recognition of any such rule. It is probably a mistake, for more than one reason, to draw any very wide deductions from this passage in the judgment. In the first place, as has been shown above, it is not essential to the decision, which can be supported on narrower grounds. In the second place, at any rate as far as the question of criminal jurisdiction is concerned and the existence of a general principle limiting it (subject to exceptions whose general recognition is proved) in the case of foreigners to territorial jurisdiction, the Court certainly did not deny its existence, when territorial jurisdiction is understood to cover objective territorial jurisdiction, and Lord Finlay and Judges Nyholm, Weiss, Altamira, and Moore all affirm the existence of this limitation to territorial jurisdiction, and in the circumstances it is doubtful whether the principle can be said to be seriously shaken. Judges Loder, Nyholm, and Altamira in their opinions also dispute with considerable force the Court's starting-point, that in international law everything is lawful unless an express rule of positive law can be found against it. Judge Nyholm makes the following remarks on this point :

"The reasoning of the judgment appears to be that, failing a rule of positive law, the relations between states in the matter under consideration are governed by an absolute freedom. If this reasoning be followed out, a principle of public international law is set up that where there is no special rule, absolute freedom must exist. The basis of this reasoning appears to be that it is vaguely felt that, even outside the domain of positive public international law, the situation of fact as regards relations between nations in itself embodies a principle of public law. But that is a confusion of ideas. In considering the existing situation of fact, a distinction should be drawn between that which is merely an international situation of *fact* and that which constitutes a rule of international *law*. The latter can only be created by a special process and cannot be deduced from a situation which is merely one of fact."

E.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS, 1927

JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDGMENT No. 9. DELIVERED JULY 26, 1927.

*Case concerning the Factory at Chorzow,*¹

THE twelfth (ordinary) session of the Court opened in June, 1927, with an exceptionally heavy list. In the above case, which was the first to be decided, the question of certain German interests in Polish Upper Silesia came before the Court for the third time, the previous decisions on the same subject being reported in the Year Book for 1926 (Judgment No. 6) and 1927 (Judgment No. 7). It may be recalled that in the first of those cases the Court held that it had jurisdiction to entertain a claim by the German Government against the Polish Government under the Geneva Convention of May 15, 1922, in regard to the application of the Polish Law of July 14, 1920, to the German nitrate factory at Chorzow and certain large agricultural estates in Polish Upper Silesia said to be owned by German nationals. In the second case the merits of that claim were adjudicated upon and the Court held that the application of the Polish law constituted, in so far as it affected German nationals or companies controlled by them, a measure contrary to Article 6 and the following articles of the Convention. As regards the factory at Chorzow, however, the judgment stated that the Court was not called upon, in the absence of properly formulated claims, to say what attitude on the part of the Polish Government would have been in conformity with the Convention. The present case raises the question of the compensation payable by the Polish Government for the breach of their international obligations in regard to the factory. The German Government, by an Application filed on February 8, 1927, claimed that as a result of this breach, found by the Court, the Polish Government were bound to make good the damage sustained by the two interested companies, which was assessed at a large sum. In reply to this Application the Polish Government took a preliminary objection to the jurisdiction of the Court and this forms the subject-matter of the case under report.

As in the previous proceedings, the German Government based its right to bring the present matter unilaterally before the Court upon Article 23, paragraph 1, of the Geneva Convention which runs as follows: "Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments they shall be submitted to the Permanent Court of International Justice." It was common ground that the

¹ The judgments and advisory opinions of the Court and the Acts and documents relating thereto are issued by the Court in three separate series, namely, *Judgments* (Series A), *Advisory Opinions* (Series B), and *Acts and Documents relating to Judgments and Advisory Opinions* (Series C). The publisher is A. W. Sijthoff's Publishing Co., Leyden (English Agents: Butterworth & Co., Bell Yard, W.C. 2).

acts in respect of which reparations were now claimed were acts which the Court, in Judgment No. 7, had declared not to be in conformity with Articles 6 to 22 of the Convention, but the Polish Government disputed the jurisdiction on two main grounds. They contended :

- (1) that Article 23, paragraph 1, set out above does not contemplate differences in regard to reparations claimed for violation of those articles ; and
- (2) that the Convention has instituted special jurisdictions for claims which private persons might assert in the event of the infringement of their rights and that the existence of these jurisdictions would exclude or affect that of the Court even if Article 23, paragraph 1, could be construed as including differences of opinion in regard to reparations.

In regard to the first of these contentions the judgment of the Court states that " it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the Convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application ".

The Polish Government relied in support of their contention upon the history of arbitration agreements during the past fifty years. Their Counsel admitted that the arbitration clause, whereby contracting Parties agreed to submit to arbitration any difference as to the interpretation or application of the particular treaty in which it was contained, was originally interpreted as including claims for reparation ; but he maintained that, because of later developments, the clause must now be interpreted as excluding such claims. This view was rejected by the Court. It points out, on the one hand, that although from the time of the Hague Convention of 1899 an active movement was begun for the conclusion of treaties providing for obligatory arbitration, it was only found feasible to include certain classes of questions within the obligation and even these were subjected to reservations, and on the other hand that ever since the end of the eighteenth century it had been found possible to conclude agreements for the submission of pecuniary claims to arbitration without reserve. " These facts appear to be logically fatal to the inference sought to be drawn from them, for they clearly show that, in the opinion of Governments, the differences concerning which reserves were deemed necessary were those relating to legal rights and obligations and not those relating to pecuniary reparation. To say, therefore, that the *clause compromissoire*, while confessedly providing for the submission of questions of right and obligation, must now be restrictively interpreted as excluding pecuniary reparation, would be contrary to the fundamental conceptions by which the movement in favour of general arbitration has been characterized." The Court, moreover, adds a caution as to the relevance of expressions used in conventions between other Powers and at different periods for the purpose of interpreting the intention of the signatories of the Geneva Convention.

The classification of disputes in Article 13 of the Covenant and Article 36 of the Court's Statute would lead to the same conclusion. " It is true that the Covenant and the Statute mention separately, in the first place, ' disputes as to the interpretation of a treaty ' and, in the fourth place, those relating to ' the nature or extent of the reparation ' ; but they also mention, in the third place, as a separate category, disputes relating to ' the existence of any fact which, if

established, would constitute a breach of an international obligation'. Now it is established by Judgments Nos. 6 and 7, that the Court has jurisdiction to decide whether a breach of Articles 6 to 22 has taken place or not. The decision whether there has been a breach of an engagement involves no doubt a more important jurisdiction than a decision as to the nature or extent of reparation due for a breach of an international engagement the existence of which is already established. If Article 23, paragraph 1, covers the disputes mentioned in the first and third categories by the two provisions above mentioned, it would be difficult to understand why—failing an express provision to that effect—it should not cover the less important disputes mentioned in the fourth category." From the above considerations the Court concludes that Article 23, paragraph 1, of the Convention contemplates all differences of opinion resulting from the interpretation and application of the articles referred to, inclusive of differences relating to reparations. "Application" is a wide and elastic term.

The Judgment further states that "for the interpretation of Article 23, account must be taken not only of the historical development of arbitration treaties as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision. The Geneva Convention provides numerous means of redress to secure the observance of its clauses and it does so in ways varying according to the subjects dealt with under the different heads of the Convention. Article 23 contains provisions of this kind in so far as concerns Articles 6 to 22 which form the greater portion of head III. The object of these methods of obtaining redress—and that of Article 23 in particular—seems to be to avert the possibility that, in consequence of the existence of a persistent difference of opinion between the contracting Parties as to the interpretation or application of the Convention, the interests, respect for which it is designed to ensure, may be compromised. An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for the re-establishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes. This conclusion, which is deduced from the object of a clause like Article 23, and, in general, of any arbitration clause, could only be defeated, *either* by the employment of terms sufficiently clear to show a contrary intention on the part of the contracting Parties, *or* by the fact that the Convention had established a special jurisdiction for claims in respect of reparation due for the violation of the provisions in question, or had made some other arrangement regarding them." But as already explained the terms of Article 23, paragraph 1, do not establish the existence of any such contrary intention.

The Court, therefore, proceeds to consider the second contention of the Polish Government, namely, that there are other tribunals before which the injured companies could assert their right to an indemnity and that, in these circumstances, the German Government cannot, by substituting itself for these companies, disturb the jurisdictional system established by the Geneva Convention.

The Court points out in the first place that any jurisdiction which the Polish courts may have does not enter into account, inasmuch as the act complained of

is the application of a Polish law. The Tribunals to be taken into account are those contemplated by the Geneva Convention itself, namely, the Upper Silesian Arbitral Tribunal and the Germano-Polish Mixed Arbitral Tribunal. The Polish Government agreed that the former Tribunal had jurisdiction on the basis of Article 5. This article, which is the last of head II of the Convention, provides that "the question whether and to what extent an indemnity for the suppression or diminution of vested rights must be paid by the state, will be directly decided by the Arbitral Tribunal upon the complaint of the interested party". This contention is rejected by the Court because the jurisdiction conferred upon the Tribunal by this article relates to the subject-matter dealt with in head II of the Convention, which concerns the protection of vested rights, whereas the dispossession of the two companies was a violation of head III. It follows that the competent tribunals can only be those provided for by head III.

The jurisdiction of the Germano-Polish Mixed Arbitral Tribunal, derived from the Treaty of Versailles, is expressly reserved by Article 23, paragraph 2, of the Geneva Convention. The explanation of this provision, the Court points out, is that head III of the Convention has not abolished, although it limits in several respects, the liquidation régime instituted by the Treaty of Versailles. Under that system an appeal to the Mixed Arbitral Tribunal was allowed, and inasmuch as the treatment accorded to German nationals by the Geneva Convention is more favourable than that resulting from the Treaty of Versailles there could be no question of abolishing or diminishing the guarantees under the treaty. For this and other reasons it was natural expressly to reserve the right of appeal to the Mixed Arbitral Tribunal. Article 22 of the Geneva Convention also bestows jurisdiction on this Mixed Arbitral Tribunal, but it is clear in this case also that regular expropriations, effected within the limits fixed by the preceding articles, are alone contemplated. The acts, however, in respect of which the German Government was now claiming an indemnity on behalf of the dispossessed companies are special measures falling *outside* the normal operation of Articles 6 to 22 of the Geneva Convention. In the present case reparation is the outcome, not of the application of Articles 6 to 22, but of acts contrary to those provisions.

The Court refers to the further fact that under head III no dispossession may be effected without previous notice to the owner, affording him an opportunity of being heard before the competent tribunal. Here there was no such notice or opportunity. Consequently Poland cannot require the interested parties to look for redress to the tribunals which might have been open to them if the Convention had been applied, for the utmost they could obtain from these tribunals would be reparation for the wrong, whereas, if the procedure laid down by the Convention had been followed out, the wrong would perhaps never have occurred. Once dispossession has taken place without previous investigation of the right of ownership, an investigation undertaken in order to justify such dispossession after it has taken place could not wipe out the breach of the Convention already committed, or affect the Court's jurisdiction. "It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him."

The following statement is added : " It has been argued repeatedly in the course of the present proceedings that in case of doubt the Court should decline jurisdiction. It is true that the Court's jurisdiction is always a limited one, existing only in so far as states have accepted it ; consequently, the Court will, in the event of an objection—or when it has automatically to consider the question—only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the interested Parties exists to confer jurisdiction upon it. The question as to the existence of a doubt nullifying its jurisdiction need not be considered when, as in the present case, this intention can be demonstrated in a manner convincing to the Court."

For these reasons, the Court dismissed the plea of the Polish Government and reserved the suit for judgment on the merits.

The decision was given by a majority of ten to three, but the Polish national judge alone delivered a dissenting opinion.

JUDGMENT NO. 10. DELIVERED SEPT. 7, 1927.

*Case of the S.S. " Lotus ".*¹

This was one of the most important cases that has come before the Court, in that the question in issue was as to the jurisdiction of states on the high seas according to international law. The matter arose out of the following facts : On August 2, 1926, a collision occurred between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt*, between 5 and 6 nautical miles north of Cape Sigri (Mitylene), i.e. on the high seas outside territorial waters. The *Boz-Kourt*, which was cut in two, sank and eight Turkish nationals who were on board perished. After having done everything possible to succour the shipwrecked persons the *Lotus* proceeded on her voyage to Constantinople where she arrived on August 3. At the time of the collision, the officer of the watch on board the *Lotus* was M. Demons, a French citizen, lieutenant in the merchant service and first officer of the ship, whilst the *Boz-Kourt* was in charge of her captain, Hassan Bey, who was one of those saved from the wreck. Immediately upon the arrival of the *Lotus* at Constantinople the Turkish authorities proceeded to hold inquiries and ultimately arrested both Lieutenant Demons and Hassan Bey. On August 28 the Criminal Court of Stamboul began the trial of these two persons on a charge of manslaughter. Lieutenant Demons submitted that the Turkish courts had no jurisdiction, but this objection was overruled. When proceedings were resumed on September 11, Lieutenant Demons was, on his demand, released on bail. On September 15, the Criminal Court delivered judgment sentencing him to eighty days imprisonment and a fine of twenty-two pounds, Hassan Bey being sentenced to a slightly more severe penalty. The Public Prosecutor of the Turkish Republic entered an appeal against this decision, the effect of which was to suspend its execution and the appeal was still pending at the time of the proceedings before the International Court.

¹ See note on this case, p. 131 *supra*.

The arrest of Lieutenant Demons at once led to diplomatic representations by the French Government and after negotiations a special agreement or *compromis* was concluded between the French and Turkish Governments for reference of the dispute to the Court. The questions submitted for decision were formulated as follows :

(1) " Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so what principles—by instituting, following the collision which occurred on August 2, 1925, on the high seas between the French steamer *Lotus* and the Turkish steamer *Boz-Kourt*, and upon the arrival of the French steamer at Constantinople—as well as against the captain of the Turkish steamship—joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish sailors and passengers ?

(2) " Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases ? "

Article 15 of the Convention of Lausanne provides, so far as material for the present purpose, that all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law.

The judgment of the Court, before approaching the questions of international law involved in the case, defined the scope of the decision and held that the violation, if any, of the principles of international law consisted in the taking of criminal proceedings against Lieutenant Demons. It was not a question relating to any particular step in these proceedings—such as his trial, arrest, &c.—but the very fact of the Turkish courts exercising jurisdiction. The Court was not concerned with the lawfulness of the prosecution under Turkish law ; questions of criminal law relating to the justification of the prosecution and consequently to the existence of a *nexus causalis* between the actions of Lieutenant Demons and the loss of the eight Turkish nationals were not relevant to the issue before the Court.

The Court then proceeded to consider what were the principles of international law that the prosecution of Lieutenant Demons could be said to contravene.

Article 15 of the Convention of Lausanne (which is quoted above) refers the contracting Parties to the principles of international law for the purpose of determining their respective jurisdictions. The French Government maintained that the meaning of the expression " principles of international law " in this article should be sought in the light of the evolution of the Convention and they relied upon the preparatory work of the Lausanne Conference. With regard to this argument the judgment states that : " The Court must recall what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself. Now the Court considers that the words ' principles of international law ', as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of states. This interpretation is borne out by the context of the article itself. . . . In these circumstances it is impossible—except in pursuance of a definite stipulation—to

construe the expression 'principles of international law' otherwise than as meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties."

The Court then turned to what the judgment describes as a fundamental question of principle. The French Government contended that the Turkish Courts in order to have jurisdiction should be able to point to some title to jurisdiction recognized by international law in favour of Turkey, whereas the Turkish Government, on the other hand, contended that Article 15 allowed Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law. The Court dealt with this question as follows :

"The latter view seems to be in conformity with the special agreement itself, No. 1 of which asks the Court to say whether Turkey has acted contrary to the principles of international law, and, if so, what principles. According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings.

"... The rules of law binding upon states emanate from their own free will as expressed in Conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed.

"... all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction ; within these limits, its title to exercise jurisdiction rests in its sovereignty. . . . The Court therefore must, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of states to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case."

The Court accordingly proceeded to consider whether general international law contains a rule prohibiting Turkey from prosecuting Lieutenant Demons. The arguments advanced by the French Government were, in substance, the three following :

(1) "International law does not allow a state to take proceedings with regard to offences committed by foreigners abroad, simply by reason of the nationality of the victim ; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel.

(2) "International law recognizes the exclusive jurisdiction of the state whose flag is flown as regards everything which occurs on board a ship on the high seas.

(3) "Lastly, this principle is especially applicable in a collision case."

As regards the first argument, the Court held that as the case arose out of a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offence, whilst the victims were on board the other, it was unnecessary to consider the contention that a state cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim. "For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the state is based. Even if that argument were correct generally speaking—and in regard to this the Court reserves its opinion—it could only be used in the present case if international law forbade Turkey to take into con-

sideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that states recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, even if one of the constituent elements of the offence, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship.

The Court rejected the second argument put forward by the French Government, based on the principle that the state whose flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas, upon the ground that, even if the principle be admitted, it by no means follows that a state can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. "A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the state the flag of which it flies, for, just as in its own territory, that state exercises its authority upon it, and no other state may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory ; but there is nothing to support the claim according to which the rights of the state under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the state whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different states were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the state to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting the delinquent.

"This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the state whose flag was flown. The French Government has endeavoured to prove the existence of such

a rule, having recourse for this purpose to the teachings of publicists, to decisions of municipal and international tribunals, and especially to conventions which, whilst creating exceptions to the principle of the freedom of the seas by permitting the war and police vessels of a state to exercise a more or less extensive control over the merchant vessels of another state, reserve jurisdiction to the courts of the country whose flag is flown by the vessel proceeded against.

“In the Court’s opinion, the existence of such a rule has not been conclusively proved.”

The Court then examined the third argument advanced by the French Government, that a rule specially applying to collision cases had grown up, according to which criminal proceedings regarding such cases come exclusively within the jurisdiction of the state whose flag is flown.

The French Agent had argued that questions of jurisdiction in collision cases, though arising frequently before civil courts, are but rarely encountered in the practice of criminal courts. He deduced from this that, in practice, prosecutions only occur before the courts of the state whose flag is flown and that this circumstance is proof of a tacit consent on the part of states and, consequently, shows what positive international law is in collision cases.

The Court held that this conclusion was not warranted. “Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. . . .

“So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connexion with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. Whilst the French Government have been able to cite the *Ortigia-Oncle Joseph* case before the Court of Aix and the *Franconia-Strathclyde* case before the British Court for Crown Cases Reserved, as being in favour of the exclusive jurisdiction of the state whose flag is flown, on the other hand the *Ortigia-Oncle Joseph* case before the Italian courts and the *Ekbatana-West Hinder* case before the Belgian courts have been cited in support of the opposing contention.”

The conclusion at which the Court arrived after examining the cases and observing the absence of protests against the exercise of jurisdiction was that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the state whose flag is flown.

“This conclusion moreover is easily explained if the manner in which the collision brings the jurisdiction of two different countries into play be considered.

“The offence for which Lieutenant Demons appears to have been prosecuted was an act—of negligence or imprudence—having its origin on board the *Lotus*, whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are, legally, entirely inseparable, so much so that their separation

renders the offence non-existent. Neither the exclusive jurisdiction of either state, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two states. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction."

As the result the Court held that Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign state, the criminal proceedings in question, had not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement.

Having answered the first question submitted by the special agreement in the negative, it was unnecessary for the Court to consider the second question regarding the pecuniary reparation which might have been due to Lieutenant Demons.

This judgment was adopted by the President's casting vote, the members of the Court being divided as follows: Huber P., de Bustamante, Oda, Anzilotti, Pessoa JJ., and Feizi-Daim Bey, Turkish national judge, for the judgment; Loder, Former President, Weiss, Vice-President, Lord Finlay, Nyholm, Moore, and Altamira JJ. against. Each of the dissenting judges delivered a separate opinion, but it is to be observed that Judge Moore strongly supports the Judgment as regards the general question of jurisdiction, his dissent being based exclusively upon the particular provision of the Turkish Penal Code under which the criminal proceedings were brought.

JUDGMENT No. 11.

Case of the Re-Adaptation of the Mavrommatis Jerusalem Concessions.

In this case the Court was called upon to consider these concessions for the third time. M. Mavrommatis, a Greek national, had obtained from the Turkish authorities in Palestine before and during the war certain concessions which he claimed that the British Government, as Mandatory for Palestine, was under an obligation to maintain. The Greek Government, having taken up the case, submitted to the Court a first application in May, 1924, based upon the jurisdictional clause—Article 26—of the Mandate for Palestine. The British Government objected to the jurisdiction of the Court and the Court in Judgment No. 2 upheld the objection as regards one group of concessions—those relating to Jaffa which dated from after the outbreak of war—but dismissed it as regards the two Jerusalem concessions—one for the supply of water and the other of electricity and tramways—which were granted to M. Mavrommatis in January, 1914. This part of the suit was accordingly retained for judgment on the merits and dealt with in Judgment No. 5 delivered on March 26, 1925. This decided (1) that the concessions were valid, and (2) that they fell under Article 4 of Protocol XII of the Conference of Lausanne, and were accordingly entitled to the benefit of re-adaptation so as to be put into conformity with the new economic conditions, this second question being dealt with by the Court in virtue of an agreement between the Parties.

In execution of this judgment the Colonial Office in London began negotiations with M. Mavrommatis for the purpose of re-adapting the Jerusalem concessions;

agreement was reached and on February 25, 1926, contracts were signed by him and the representatives of the High Commissioner for Palestine, whereby M. Mavrommatis surrendered and renounced all rights and benefits under his old concessions, which were henceforth annulled, and in consideration of such renunciation new concessions were granted to him under certain conditions. These conditions included the submission of plans within certain specified times, which the High Commissioner was bound to approve or disapprove within a certain period. Before the signature of these contracts M. Mavrommatis had, on February 22, 1926, concluded an agreement for the transfer of his rights and benefits to another person in the capacity of trustee for the company which the contracts required to be formed for the purpose of operating the concessions. It was this gentleman who submitted the plans provided for under the contracts and the Colonial Office having subsequently objected to the agreement of February 22, 1926, and refused to recognize the deposit of plans as valid, M. Mavrommatis cancelled that agreement and requested the High Commissioner to retain the plans as deposited on his behalf. Ultimately the High Commissioner approved the plans for both concessions, the date in each case being within the time stipulated by the contracts, if the deposit was regarded as having been made when M. Mavrommatis requested that the plans should be treated as deposited on his behalf, but out of time if the original deposit by the assignee was valid. M. Mavrommatis claimed that the delay in approving his plans had made it impossible for him to finance the concessions and he claimed damages for alleged breach of contract by the High Commissioner. This claim was taken up by the Greek Government, which, after some negotiation with the British Government, referred the matter to the Court by an Application dated May 28, 1927.

On June 4, 1927, the Greek Government filed a Case the conclusions of which were to the following effect :

- (1) That by delaying the approval of the plans and thus preventing the putting into execution of the concessionary contracts of February 25, 1926, the British Government, as Mandatory for Palestine, had not complied with its international obligations under Article 11 of the Mandate.
- (2) That by these delays and by the hostility displayed towards him by certain British authorities—which delays and hostility were due to Mr. Rutenberg's opposition—it was rendered impossible for M. Mavrommatis to finance his concessions and he had suffered damage for which the British Government must pay him compensation, and he claimed £217,000.

The British Government thereupon filed a Preliminary Objection to the jurisdiction of the Court and after a written reply by the Greek Government this question was argued before the Court in September. Four points were raised by the British Government in support of their objection.

In the first place, in answer to certain contentions advanced in the Greek Application and Case, the British Government maintained that there was no jurisdiction in the Court to decide whether one of its judgments had or had not been complied with. The execution of judgments was entrusted by the Covenant to the Council of the League and not to the Court.

Secondly, the Court only has jurisdiction, under Article 11 of the Mandate, to deal with an alleged breach of the international obligations of the Mandatory

in so far as such breach results from the exercise of the power of public ownership or control mentioned in the article. But here there has been no exercise of this power because no right conflicting with M. Mavrommatis's rights has been granted to Mr. Rutenberg, and the fact of delay in the approval of the plans, even if it were due to the hostility of Mr. Rutenberg, as the Greek Government contended, cannot be regarded as an exercise of this power.

Thirdly, in so far as the violation of Article 11 of the Mandate, alleged by the Greek Government, is said to arise from the violation of the Protocol of Lausanne, this Protocol does not, in itself, confer any jurisdiction on the Court, and, in any case, it does not apply to the present matter because it only relates to concessionary contracts concluded between M. Mavrommatis and the Turkish authorities in 1914, and these contracts have been expressly annulled and replaced by the new contracts concluded between him and the Palestine Administration on February 25, 1926.

In the alternative, the British Government submitted that, even if the present dispute were covered by an international instrument involving that Government's consent to the reference of the dispute to the Court, the application should be rejected by reason of the non-fulfilment of a necessary condition precedent, namely, the submission by M. Mavrommatis of his claim to the Courts of Palestine, which were competent to adjudicate thereon under municipal law.

The argument on the preliminary objection turned principally upon two points: the meaning and effect of Article 11 of the Mandate and the effect in English law (by which they were governed), of the contracts of February 25, 1926. The question as to the Court's jurisdiction to decide whether one of its judgments had been carried out or not was not gone into deeply because the Greek Government disclaimed any intention of basing its claim on this ground, and the Court accordingly expressly refrained from expressing any opinion upon it. The Court also abstained from dealing with the fourth and alternative British contention, and equally found it unnecessary to decide the third point as to the effect of M. Mavrommatis's renunciation, by the contracts of February 25, 1926, of his original concessions. The judgment of the Court proceeds entirely upon the effect of Article 11 of the Mandate in relation to the facts alleged by the Greek Government.

Article 11 provides as follows: "The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connexion with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. It shall introduce a land system appropriate to the needs of the country, having regard among other things to the desirability of promoting the close settlement and intensive cultivation of the land."

Paragraph 2 refers to the possibility of making use of the services of the Jewish Agency mentioned in Article 4.

The Court interpreted this provision in its previous Judgments Nos. 2 and 5, and the present case turned substantially upon the question whether the facts alleged came within the principles there enunciated. The judgment points out that "the Court has decided that the 'international obligations accepted by the Mandatory' within the terms of Article 11 are constituted by the Protocol of

Lausanne ; but it has expressly stated that the jurisdiction bestowed upon it by Article 26 of the Mandate only covers the interpretation and application of the Protocol so far as the Mandatory, in the exercise of the full power conferred upon him by Article 11, subject to the international obligations above mentioned, may have disregarded the obligations accepted by him in signing the Protocol. The jurisdiction possessed by the Court as concerns the interpretation and application of the terms of the Mandate does not, therefore, extend to the provisions of the Protocol of Lausanne, except in relation to Article 11 of the Mandate.

“ The full power, as regards the exercise of which Article 11 makes a reservation, is a full power ‘ to provide for public ownership or control of any of the natural resources of the country or of the public works, services or utilities established or to be established therein ’. Since, in the case decided by Judgments Nos. 2 and 5, the question of ‘ public ownership ’ did not arise but only that of ‘ public control ’, the Court confined itself to the interpretation of the latter conception.

“ In this respect, it came to the conclusion that ‘ public control ’ means an economic policy consisting in subjecting, in one way or another, private enterprise to public authority. This expression, in Article 11, serves to define a situation which, although it does not take the legal form of ownership, enables the public authorities to exercise certain powers normally inherent in ownership.

“ It follows that, within the limits fixed by Article 11, power to provide for public control does not mean all the rights generally recognized as belonging to any public administration for the safeguarding of public interests ; and that the conception of ‘ public control ’ must be construed in relation to Article 11 and to the programme of economic development contemplated therein. It also follows that the question whether, in a given case, there has been an exercise of the full power to provide for public control is essentially a question that can only be decided for each particular case as it arises.”

The judgment then refers to the special circumstances which led it to hold in the previous case that the Rutenberg concessions which were relied upon as overlapping the Mavrommatis concessions, did amount to an exercise of the power of providing for public control, but points out that Judgment No. 2 states very clearly that the grant of a concession does not in itself constitute an exercise of this power. The right, reserved in certain circumstances to the authorities in respect of concessionary undertakings, to exercise powers of advice and supervision does not come within the conception of “ public control ” as used in Article 11.

“ It is clear that, according to the construction of Articles 11 and 26 of the Mandate established by the Court in Judgments Nos. 2 and 5, in all cases where an alleged breach of the Protocol of Lausanne is the outcome of the exercise of the full power given by Article 11 to provide for ‘ public control ’, but in these cases only, the Court has jurisdiction to deal with such a breach.”

These being the criteria, the Court states that in considering the second argument put forward by the British Government in support of its objection to the jurisdiction it remains to be ascertained whether the facts alleged by the Greek Government constitute an exercise of the “ full power to provide for public control ” under Article 11 of the Mandate.

The main fact relied on by the Greek Government is the alleged delay of the High Commissioner in approving the plans. But the grant of the new Mavrom-

matis concessions and all other steps taken with a view to the re-adaptation of the old concessions do not constitute an exercise of the full power in question, for the powers reserved to the authorities in the 1926 concessions all fall within the category of administrative powers in respect of private undertakings to which public services are conceded and therefore do not suffice to give the concessions in question the character of an exercise of the full power to provide for public control within the meaning of Article 11 as interpreted by the Court in Judgment No. 2.

Assuming that the attitude of the British and Palestine authorities, which is said to have resulted in the alleged delay, was not legally justifiable, or even was of an entirely arbitrary character, the non-approval of the plans within the time laid down would not in any case constitute an exercise of the full power to provide for public control.

"Being satisfied as to this point the Court must still ascertain whether any concessions granted in the exercise of the said full power—and in the present case the only concessions which enter into question are those of Mr. Rutenberg—constituted a legal obstacle to the approval of the plans within the required time. If that had been the fact, M. Mavrommatis' rights would have been violated by the mere fact of the existence of these concessions, and, although the delay would merely have made manifest the violation, the Court might nevertheless have had jurisdiction."

But the Greek Government does not base its conclusions on an alleged incompatibility between the Mavrommatis and Rutenberg concessions. What they really reproach the British Government with is that the British and Palestine authorities took advantage of Mr. Rutenberg's opposition to M. Mavrommatis utilizing the waters of the El Audja for his water concession in order to delay the approval of the plans for that concession and that they did not, in order speedily to overcome Mr. Rutenberg's opposition, postpone the final grant to Mr. Rutenberg of the concession promised to him by the contract of September 21, 1921, for the supply of electricity from the waters of the Jordan. This final grant, which took place on March 5, 1926, may be regarded as an act performed in the exercise of the full power referred to in Article 11. If it had been argued that that concession thus granted overlapped M. Mavrommatis's concessions and infringed his rights, the Court would have been confronted with a situation resembling that with which it had to deal in Judgment No. 2. "But in the present case the situation is essentially different. All that the authorities are reproached with is that they did not refuse to grant this concession until Mr. Rutenberg had abandoned his claim to exclude M. Mavrommatis from utilizing the El Audja. The reservation made by Article 11 in regard to international obligations may—according to the context—only be intended to prevent rights, acquired by private persons and protected by the Protocol of Lausanne, from being disregarded in order to render possible or easy the acquisition or exercise of public ownership or of public control; but it cannot be maintained that this reservation obliges the Mandatory to take advantage of negotiations in progress with the holder of a concession to be granted in the exercise of this full power, in order to bring pressure to bear upon him in favour of another concessionaire, who claims to be protected by the Protocol of Lausanne.

"In point of fact the Greek Government does not accuse the British Govern-

ment of having violated M. Mavrommatis's rights by definite action taken under Article 11 ; it is rather a question of a passive and negative attitude, which is said to constitute the ' hostility ' referred to in the second submission of the Greek Case as the cause of the unjust injury which, in the Greek Government's contention, has been inflicted.

" In the Court's opinion—even admitting that the exercise of the full power mentioned in Article 11 may also take the form of action designed to set aside private ownership and control, thus making possible the acquisition of public ownership and control—there is no need to consider this hypothesis, seeing that, even *prima facie*, the contentions of the Greek Government do not seem capable of establishing acts of this nature."

For these reasons, the Court arrives at the conclusion that the second contention of the British Government was well founded, and accordingly upholds the preliminary objection on this ground. The decision was given by a majority of seven to four, the following three Judges delivering separate dissenting opinions : MM. Nyholm, Altamira and Caloyanni (Greek national judge).

ADVISORY OPINION No. 14.

Jurisdiction of the European Commission of the Danube.

This case arose out of a dispute between Great Britain, France and Italy, on one side, and Rumania on the other, in regard to the powers of the European Commission of the Danube—designated for brevity as the E.C.D.—which is charged with the duty of assuring freedom and equality of navigation on the maritime Danube, and which is composed of a representative of each of these four states. The dispute was submitted in the first instance to the Advisory and Technical Committee for Communications and Transit of the League of Nations, which appointed a Special Committee of three experts to investigate and report, but the procedure before these bodies not having led to any agreement between the Parties they concurred in asking the Council of the League to refer the questions in issue to the Court for an advisory opinion. It is to be noticed that it was the contention of Great Britain and the states associated with her that the dispute came within the compulsory jurisdiction of the Court under Article 376 of the Treaty of Versailles, whereas Rumania maintained the contrary, and the submission for an advisory opinion was without prejudice to these conflicting views.

The questions referred to the Court were as follows :

(1) " Under the law at present in force, has the E.C.D. the same powers on the maritime sector of the Danube from Galatz to Braila as on the sector below Galatz ? If it has not the same powers, does it possess powers of any kind ? How far upstream do they extend ?

(2) " Should the E.C.D. possess either the same powers on the Galatz-Braila sector as on the sector below Galatz, or certain powers, do these powers extend over one or more zones, territorially defined and corresponding to all or part of the navigable channel to the exclusion of other zones, territorially defined and corresponding to harbour zones subject to the exclusive competence of the Rumanian authorities ? If so, according to what criteria shall the line of demarcation be fixed as between territorial zones placed under the competence of the E.C.D. and zones placed under the competence of the Rumanian authorities ? If the contrary is the case, on what non-territorial basis is the exact

dividing line between the respective competence of the E.C.D. and the Rumanian authorities to be fixed ?

(3) " Should the reply given to (1) be to the effect that the E.C.D. either has no powers in the Galatz-Braila sector, or has not the same powers as in the sector below Galatz, at what exact point shall the line of demarcation between the two régimes be fixed ? "

The procedure before the Court followed closely the analogy of a contentious case ; Memorials and Counter-Memorials were filed, together with a great mass of documents, and elaborate verbal arguments, extending over six days, were heard. The opinion of the Court, which was delivered on December 8, 1927, in dealing with the first question states that in ascertaining what is " the law at present in force " the first source to be consulted is the Convention establishing the Definitive Statute of the Danube, made in pursuance of Article 349 of the Treaty of Versailles (and the corresponding articles of the other Peace Treaties), and signed in Paris on July 23, 1921, between Belgium, France, Great Britain, Greece, Italy, Rumania, the Serb-Croat-Slovene State, Czechoslovakia, Germany, Austria, Bulgaria, and Hungary. This instrument, however, is not complete in itself. Many of its articles refer to previous international engagements and Article 41 expressly provides that all treaties relative to international waterways in general and the Danube in particular, which were in force when the Statute was signed are maintained in all their stipulations not abrogated or modified by the Statute itself.

In the course of the dispute, there had been much discussion as to whether the Conference which framed the Definitive Statute had authority to make any provisions modifying the powers and functions of the E.C.D. as laid down by the Treaty of Versailles, and as to whether the meaning and scope of the relevant provisions of both the Treaty of Versailles and the Definitive Statute are the same or not. But in the opinion of the Court, " as all the Governments concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute they cannot, as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Conference under Article 349 of the Treaty of Versailles ".

The Court proceeds to consider the terms of the Definitive Statute and points out that, after reciting that the navigation of the Danube shall be free and open to all flags under conditions of complete equality on the entire navigable course of the river between Ulm and the Black Sea, the Statute expressly declares in Article 3 that the freedom of navigation and the equality of flags shall be assured by two distinct Commissions, namely (1) the E.C.D., whose jurisdiction, as it is determined in Chapter II, extends over the part of the river called the maritime Danube, and (2) the International Commission of the Danube, whose jurisdiction, as it is determined in Chapter III, extends over the navigable fluvial Danube.

The relevant articles for the purpose of the present submission are Articles 5 and 6 in Chapter II, which read as follows :

Article 5 : " The E.C.D. retains the powers which it possessed before the war. No alteration is made in the rights, prerogatives and privileges which it possessed in virtue of the treaties, conventions, international acts, and agreements relative to the Danube and its mouths."

Article 6 : " The authority of the E.C.D. extends, under the same conditions as before, and without any modifications of its existing limits, over the maritime

Danube, that is to say, from the mouths of the river to the point where the authority of the International Commission commences."

"Article 6 thus specifically declares that the jurisdiction of the E.C.D. extends to the point at which the jurisdiction of the International Commission begins, and in Chapter III of the Definitive Statute, entitled 'Fluvial Danube', Article 9, provides that the jurisdiction of the International Commission extends over the part of the Danube between Ulm and Braila.

"It is thus precisely determined, in connexion with Article 6, that the jurisdiction of the E.C.D. extends from the mouths of the river to Braila. By the foregoing provisions, and particularly by Articles 3, 6 and 9, the Definitive Statute obviously assures the internationalization, by means of the two Commissions, of the entire course of the river, uninterruptedly from Ulm to the Black Sea.

"On the face of the provisions of Articles 5 and 6, whilst Article 6 deals with the territorial extent of the powers of the European Commission (*compétence territoriale*), Article 5 refers to the nature and scope of the said powers (*compétence matérielle*).

"Article 5, however, does not define directly what the powers of the European Commission are; it only says that the Commission retains the powers which it possessed before the war, and that no alteration is made in the rights, prerogatives and privileges which it has under the treaties, conventions, international acts, and agreements relative to the Danube and its mouths.

"It is to be inferred from Article 5 that, unless there is some special provision to the contrary, all the powers conferred upon the European Commission by the treaties, conventions, international acts and agreements referred to in the said article extend over the sector of the Danube over which, by virtue of the combined effect of Articles 6 and 9, the authority of the E.C.D. clearly extends.

"Such a special provision might be looked for in the intermediate clause of Article 6, according to which the authority of the E.C.D. is to extend over the above-mentioned area under the same conditions as before, and without any modification of its existing limits (*dans les mêmes conditions que par le passé et sans aucune modification à ses limites actuelles*).

"These words may be interpreted as leaving it open to show that the jurisdiction of the E.C.D., extending over the maritime Danube from the mouths to the point where the jurisdiction of the International Commission begins, was not exercised in the same way in all places; and as it is admitted that the Commission possesses all its powers in the sector from the sea up to Galatz, the words *dans les mêmes conditions que par le passé et sans aucune modification à ses limites actuelles* would only have the effect of reserving the possibility that some of the powers of the Commission do not extend from Galatz up to the point where the jurisdiction of the International Commission commences.

"It is important to lay stress on the fact that the text not only does not say what are the powers of the E.C.D. which would not extend over the sector Galatz-Braila, but that it does not even affirm that there are powers so limited. The effect of the provision is simply this: if there are powers of the E.C.D., the territorial extent of which is more restricted than the territorial extent of other powers, the existing limits shall be maintained.

"The question thus arises whether the 'same conditions as before' and the 'existing limits' referred to in Article 6 are such conditions and limits as may be

inferred from rules of law or conditions and limits which existed in fact before the war."

By a series of pre-war treaties jurisdiction was admittedly conferred upon the E.C.D. up to Galatz. The Treaty of London of 1883 by Article 1 extended this jurisdiction to Braila, but Rumania was not a party to this instrument and there was great controversy as to whether she was bound by the provisions of that article as being a valid exercise of the mandate conferred upon the signatories by the Treaty of Berlin of 1878 and for other reasons. The Court does not find it necessary to decide the difficult questions thus raised, but observes that "if Article 6 of the Definitive Statute should be construed as referring solely to legal arrangements these would include, among other things, Article 1 of the Treaty of London. . . . Rumania did not sign or ratify this treaty. But to assume that for this reason the E.C.D. possesses no power at all in the sector above Galatz is not consistent with the Definitive Statute, which fixes the territorial extent of the powers of the Commission from the mouths of the river to the point where the authority of the International Commission commences, and therefore excludes the possibility that no powers whatever exist between Galatz and Braila.

"It may also be observed that, according to the record before the Court, it has been contended that the Definitive Statute was so framed as to perpetuate the divergence of views which had arisen under Article 1 of the Treaty of London between the states represented on the E.C.D. This contention cannot however be accepted, because it would amount to the maintenance over the Danube system of an uncertain and precarious situation.

"On the other hand, it is quite reasonable to suppose that the controversy was settled on the basis of the *status quo ante bellum*. The Treaty of London and the divergence of views concerning its validity had not prevented the E.C.D. from accomplishing its task. In the long period of time that has elapsed since the conclusion of the Treaty of London, matters had continued in a more or less satisfactory way, and no one denied that the E.C.D. had exercised some powers on the sector from Galatz to Braila, no matter what the legal ground and nature of these powers may have been. In these circumstances, the confirmation of the jurisdiction of the E.C.D., as it was exercised before the war in the contested sector of the Danube, might easily have appeared to be the best possible solution of the difficulty. It may be added that the restoration of the *status quo ante bellum* was one of the leading principles of the provisions of the Treaty of Versailles concerning the Danube as well as of those of the Definitive Statute.

"The Court, therefore, has arrived at the conclusion that the words 'under the same conditions as before and without any modification of its existing limits' in Article 6 of the Definitive Statute, refer to the conditions which existed in fact before the war in the contested sector, and that their effect is to maintain and confirm these conditions, thus putting an end to the questions which had arisen under Article 1 of the Treaty of London.

"Before entering upon the analysis of the contentions of the Governments concerned, the Court observes that the view which it has just developed as to the purport of the Definitive Statute is based solely on the language employed in the Statute and on the historical facts upon which it rests, without any reference to preliminary discussions or drafts. The Court adheres to the rule applied in its previous decisions that there is no occasion to have regard to the protocols of the conference at which a convention was negotiated in order to construe a text

which is sufficiently clear in itself. If, however, some doubt could still remain upon the true meaning of the words *dans les mêmes conditions que par le passé et sans aucune modification à ses limites actuelles*, it will be shown later on that the preparatory work fully confirms the conclusion at which the Court has now arrived."

Having thus stated its opinion upon the principles governing the question, the Court proceeds to consider the contentions of the interested states. It points out that France, Great Britain and Italy, contended that all the powers of the E.C.D. apply in the same way on the Galatz-Braila sector as they do below Galatz, whereas Rumania's contention was, broadly speaking, that from the mouths to Galatz the Commission possesses all the rights conferred upon it by treaties and other international agreements, but from Galatz to Braila only "technical powers", i.e. the power of doing the works required to keep the river in a state suitable for navigation and of maintaining a pilotage service, and not "juridical powers", i.e. especially the power of enforcing regulations.

The Rumanian case was largely founded upon arguments drawn from the preparatory work of the Danube Conference, as well as the Versailles Conference. With regard to the latter, the Court observes that these records "being confidential and not having been placed before the Court by, or with the consent of the competent authority, the Court is not called upon to consider to what extent it might have been possible for it to take this preparatory work into account".

In examining the records of the Danube Conference the Court "recalls", in reference to one of the points raised, "that preparatory work should not be used for the purpose of changing the plain meaning of a text", and expresses the opinion that, in fact, these records do not furnish anything calculated to overrule the construction indicated by the actual terms of Article 16.

The Rumanian Government attached special importance to an "Interpretative Protocol to Article 6" drawn up by the delegates of the E.C.D. at the request of the Conference, communicated to it at its last meeting, and annexed to the procès-verbal of the day. After pointing out that the terms of this document are not clear in themselves, the Court declares that it "is not an international agreement between the Parties to the Definitive Statute; it is not annexed thereto, whilst many interpretations of the articles of the Statute were inserted in the Final Protocol, which has the same validity and duration as the Convention to which it refers. The Interpretative Protocol is not even mentioned in the Statute, which Rumania signed without any reservation, and can in no sense be considered as a part of it. Neither is it possible to consider the Interpretative Protocol as a decision of the E.C.D. by which the terms of the Definitive Statute were modified . . . the Commission had no power to decide to abandon the functions with which it was entrusted under existing international agreements. The Court, therefore, can only consider the Interpretative Protocol as a part of the preparatory work. Whatever may be its importance from this point of view, it is certain that it cannot prevail against the Definitive Statute".

The Court records that whilst it was admitted in the course of the arguments submitted on behalf of Rumania, that the E.C.D. may have exercised certain powers in the contested sector, it was contended that such exercise was based on mere toleration by the territorial state and that toleration could not serve as a basis for the creation of legal rights. In respect of this contention the Court

observes that, under the construction of Article 6 adopted by it, even if, before the war, an actual exercise of certain powers by the Commission above Galatz was based on mere toleration, this practice has now been converted into a legal right by Article 6. It is therefore not necessary to examine whether, in international law, the continued exercise of certain powers might not have converted into a legal right even a situation considered by Rumania as a mere toleration. "It cannot be maintained that Article 6 was intended to continue in a state of mere toleration the situation which existed before the war; for toleration implies a negation of right; and as has already been shown, it would be entirely at variance with the legal system established by the Definitive Statute, if on one sector of the river neither Commission should have any legal powers."

As indicated above, the construction placed by the Court upon Article 6 of the Definitive Statute made it necessary to examine and consider whether, in point of fact, the E.C.D. exercised before the war the same powers between Galatz and Braila as below Galatz. Before entering upon this inquiry, however, the Court thought it convenient to examine what are the powers conferred upon the E.C.D. by the treaties and other international instruments referred to in Article 5 of the Statute, particularly for the purpose of seeing whether they support the distinction drawn by the Rumanian Government between technical and juridical powers. To this end the opinion reviews the history of the provisions made for securing freedom of navigation on international rivers in general, and the Danube in particular, from the Congress of Vienna of 1815 to the present time, the result at which the Court arrives being that the international instruments defining the powers of the E.C.D. negative any such distinction. It is only if a situation of fact had developed superseding the legal situation defined by the relevant international acts that the distinction in question could be made.

The facts having already been investigated by the Special Committee appointed by the League of Nations and its report having been adopted by the competent body of the League, the Court states that it does not think it proper to make new investigations. Although the Rumanian Government has refused to accept the facts established by the Committee as conclusive, the Court is of opinion that for the purposes of the present procedure it must accept the findings of the Committee on issues of fact unless in the records submitted to the Court there is evidence to refute them. The Special Committee had found that the E.C.D. in fact exercised full powers on the disputed sector before the war; the Court reviews the evidence adduced by the Committee and finds that it amply supports this conclusion.

With regard to the last part of question No. 1, namely, how far upstream do the powers of the E.C.D. extend, the Court, for a number of reasons which do not seem to be of sufficient general interest to be reported here, holds that the limit is the upstream side of the port of Braila.

Question No. 2. The Court points out that since the Definitive Statute, in so far as it applies to the maritime Danube, does not contain any specific provisions relating to ports, the question of the jurisdiction of the E.C.D. in relation to ports can only be considered and dealt with as a special application of the principles embodied in Articles 5 and 6 of the Definitive Statute.

The Rumanian Government upheld the view that the limit between the competence of the E.C.D. and that of the Rumanian authorities is of a territorial nature and is formed by transverse lines drawn across the river with their

points of departure at the upstream and downstream limits of the port, thus creating sectors which would be wholly subject to the territorial authorities alone. The Court rejects this view, observing that it is not founded upon any text in force and is, moreover, contrary to certain of the Navigation Regulations of the Commission. As already indicated, the E.C.D. is entrusted with the task of ensuring free navigation on the maritime Danube. "From this point of view it would be inconceivable that the territorial jurisdiction of the E.C.D. should be interrupted by port sectors exclusively subject to the territorial authorities. In order to permit of the river being so dismembered a special provision to that effect would have to exist. Now Article 3 of the Definitive Statute on the contrary clearly lays down the principle that the two parts of the Danube are wholly subject, that is to say over the whole course of both sectors, to the authority of one or other of the Commissions." Moreover, the facts recorded by the Special Committee and all the information furnished to the Court as to the practice lead to the conclusion that the dividing line is of a non-territorial nature.

In considering what non-territorial criterion is to be applied the Court states that "although the E.C.D. exercises its functions 'in complete independence of the territorial authorities' (Treaty of Berlin, 1878), and although it has independent means of action and prerogatives and privileges which are generally withheld from international organizations, it is not an organization possessing exclusive territorial sovereignty. Rumania exercises sovereignty as territorial sovereign over the maritime Danube in all respects not incompatible with the powers possessed by the E.C.D. under the Definitive Statute. When in one and the same area there are two independent authorities, the only way in which it is possible to differentiate between their respective jurisdictions is by defining the functions allotted to them. As the E.C.D. is not a state, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it". "The international instruments, from the Treaty of Paris of 1856 onwards, do not specially relate to the navigable channel or the ports; they deal with the navigation of the Danube, of which both the channel and the ports are essential features."

The task of the E.C.D. is to assure freedom of navigation and "the conception of navigation includes primarily and essentially the conception of the movement of vessels with a view to the accomplishment of voyages". "Freedom of navigation, regarding navigation as the movement of ships, must be assured by the E.C.D. on the whole river, including the portions of the river in the neighbourhood of ports, or which actually constitute a port". "Freedom of navigation is incomplete unless shipping can actually reach the ports under the same conditions. The Commission's powers therefore extend to navigation into and out of the port, as well as through the port."

The investigations of the special Committee show that the Rumanian authorities have exercised control over the ports of Galatz and Braila as regards vessels moored in those ports. Further it is generally agreed that the power of regulation and jurisdiction in relation to installations and the port services for loading and unloading belong to the Rumanian authorities. But even in these matters the E.C.D. possesses a right of supervision with a view to ensuring freedom of navigation and equal treatment for all flags.

In the result the Court by nine votes to one (M. Negulesco, Deputy-Judge, dissenting) answered the questions as follows :

(1). (a) " that under the law at present in force the E.C.D. has the same powers on the maritime sector of the Danube from Galatz to Braila as on the sector below Galatz ;

(b) " that these powers extend up to the port of Braila, this port being included ;

(2). (a) " that the powers of the E.C.D. extend over the whole of the maritime Danube, and are not excluded from zones territorially defined and corresponding to harbour zones ;

(b) " that the dividing line between the respective competences of the E.C.D. and of the Rumanian authorities in the ports of Galatz and Braila is to be fixed according to the criteria ;

(i) " of navigation, in the sense of the movement of ships as part of their voyage, the E.C.D. being also competent in regard to navigation in ports, whether the ships are passing through or coming to or leaving their moorings, as far as navigation so understood is concerned ;

and (ii) " of the obligation to ensure freedom of navigation and equal treatment of all flags, the E.C.D. being competent, also as concerns the ports, to exercise the supervision inherent in this obligation ;

(3). " that it is not necessary to give an answer to the question put under No. 3 "

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DECISIONS OF THE AMERICAN-MEXICAN MIXED CLAIMS COMMISSION, 1927 ¹

(Continued from the Year Book for 1927, pp. 179-86.)

Substitution of new claimant.

In the case of *Jennie L. Corrie* ² the question involved was the right of the United States to substitute as the claimant in the place of the mother of a deceased American seaman on account of whose killing the claim for damages was made, the father of the victim, it having come to the knowledge of the

¹ The decisions here summarized are those rendered between January and July 21, 1927, by the General Mixed Claims Commission provided for by the Convention of September 10, 1923. The commission has not been functioning since July 21, 1927, owing to the resignation of the presiding commissioner, Mr. Van Vollenhoven, and the non-appointment of his successor. All the opinions thus far rendered have been collected and published by the United States government in a volume of 489 pages. Most of them have been reproduced in the successive pages of the *American Journal of International Law*. Altogether 60 awards have been made ; 51 in favour of the United States, totalling \$2,221,659 ; and 9 in favour of Mexico, totalling \$39,000.

The work of the Special Mixed Claims Commission provided for by the Convention of September 8, 1923, was suspended in April, 1926, on account of the resignation of Dr. Octavia, the presiding commissioner, which is believed to have been due to the criticism in the United States of the award in the *Santa Isabel* case (see *B.Y.B.I.L.* for 1927, p. 180). The two governments have not been able to agree upon the appointment of his successor. It is understood that an effort is being made to settle the special claims of the United States against Mexico through diplomatic negotiation.

² *Opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico*, p. 213. Hereafter cited as *Opinions*.

American agent that the original claimant had died in 1921. The motion to substitute the new claimant was challenged by Mexico on the ground that by the terms of the Convention the time for filing the claim had expired and it could not therefore be heard. The Commission decided by a unanimous vote that since the substitution did not involve any modification in the nature, the amount or the nationality of the claim—both claimants being the deceased sailor's parents and the claim of the father being identical with that of the mother (the original claimant), the proposed rectification was not in the nature of a new claim and was not therefore in conflict with the Convention. The case was distinguishable from others relied upon by Mexico, which involved the question as to who should be admitted as the claimant after the death of the original claimant or who should be recognized as the beneficiary of an award when the original claimant died after the award had been made, and others of like character.

Responsibility for negligence of Customs officials.

In the case of *Toberman, Mackey and Company*¹ the United States claimed damages from Mexico on behalf of the claimant for losses sustained on account of the negligence or lack of care of the Mexican customs authorities in consequence of which a quantity of hay, which had been placed on the wharf and inadequately protected from exposure, was ruined. The claim was disallowed by a unanimous vote of the Commission on the ground that there is no "clear principle of international law which obliges a government to take special care, as if it were a private storage concern, of merchandise which comes in through its custom houses, for the purpose of exercising the sovereign right of collecting import and export duties". A state might, the Commission added, assume such an obligation but an examination of the Mexican customs laws showed that Mexico had never intended to assume such an obligation and it could not therefore be held responsible for the loss sustained by the claimant.

What is Denial of Justice?—Right of fugitive from justice as claimant.

In the case of *B. L. Chattin*² a claim was made by the United States for damages on account of the alleged illegal arrest, trial, sentence, and inhuman treatment of an American citizen. The doors of the jail in which the claimant had been imprisoned in Mexico having been thrown open by the population of the town in which it was situated, during the period elapsing between the departure of the Diaz authorities and the arrival of those representing the Madero government, and the claimant having escaped to the United States, Mexico contended that he was a fugitive from justice and had therefore forfeited his right to invoke the protection of the United States and its interposition in his behalf. As to this contention the Commission held by a majority vote that while a fugitive from justice might lose *his* right to invoke the protection of his government it did not follow that his government lost *its* right to espouse his claim, even admitting that a person who leaves a jail which has been thrown open, may properly be regarded as a fugitive from justice. No cases could be found, it was asserted, which laid down the principle that international tribunals are bound to reject the claims of fugitives from justice; on the contrary there were cases in

¹ *Opinions*, p. 306.

² *Ibid.*, p. 422.

which no importance had been attached to the fact that the claimant had escaped from jail (9. The *Pelletier case*, Moore, *Int. Arbs.*, p. 1779).¹

Before taking up the allegations as to the trial and conviction of the claimant, Mr. Van Vollenhoven, speaking for the Commission, entered upon an examination of what constitutes denial of justice. He distinguished between the liability of a government for the acts of its executive and legislative authorities and liability for the acts of the judicial authorities and pointed out that the term "denial of justice" was often applied to both categories of acts without discrimination. This was confusing and improper because if "denial of justice" applies to the acts of executive and legislative authorities as well as the acts of the judiciary, there would exist no international wrong which could not be covered by the phrase "denial of justice", and the expression would lose its value as a technical distinction. A distinction was also made between denial of justice strictly speaking, as when a tribunal refuses redress, and denial of justice improperly speaking, as where the proceedings of the tribunal are notoriously unjust.

When, therefore, the American agent contended that there had been a "denial of justice" in this case he used the term in its improper and confusing sense. In either case, acts of the judiciary do not constitute a denial of justice unless the wrong committed amounts to "an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiassed man". Applying this test—"the test of international standards"—to the treatment of Chattin, the Commission found Mexico to be guilty of denial of justice in that there had been unnecessary delay in the trial, that the accused had not been duly informed of the charges against him, that the hearings in open court had been a mere formality, lasting only five minutes, that he was not confronted by his accusers and that the whole procedure disclosed "a most astonishing lack of seriousness on the part of the court". The claimant was therefore awarded damages of \$5,000.

Similar questions were involved in the case of *Haley*² decided on the same date. The claimant alleged that his arrest, trial, and sentence were illegal and that he had been inhumanly treated during his detention in jail. Like Chattin he had escaped from jail through the opening of its doors by the people of the town, and, as in that case, Mexico contended that he was a fugitive from justice and therefore stopped from claiming damages. As in the former case the Commission found that there had been a denial of justice and the claimant was awarded damages of \$5,000 without interest.

Denial of Justice. Inadequacy of measures to apprehend and punish offender and to afford protection.

In the case of *G. A. Kennedy*³ the United States claimed \$50,000 on account of damages sustained by the claimant, who was wounded by a Mexican. The claim was based on alleged denial of justice resulting from the failure of the Mexican authorities to take adequate measures for the apprehension and punishment of

¹ The Commission had already decided two weeks earlier (July 8), in the case of *Strother*, a claimant for damages on account of arbitrary and illegal detention and inhuman treatment, and who (*by his own effort*) had escaped from prison and subsequently been rearrested, that the fact of his escape did not preclude him from claiming damages and this circumstance should not be taken into account in fixing the amount of damages.

² *Opinions*, p. 465.

³ *Ibid.*, p. 289.

the offenders and to furnish proper protection to the victim. The principal offender was sentenced to two months' imprisonment but was immediately released since he had already been detained in prison five months pending trial. The Commission held unanimously that the punishment imposed was not proportionate to the crime, as "international duty" requires in the case of crimes against aliens, and on this ground it awarded the claimant \$6,000 although the evidence was not sufficient to establish the failure of the Mexican authorities to afford him reasonable protection.

In the case of *George D. Richards*¹ the facts were somewhat similar. An indemnity was claimed by the United States on account of the killing of the claimant's father in Mexico. Upon request the Mexican authorities had provided an escort of two soldiers for the protection of the victim, but he was, nevertheless, ambushed and shot while he and the escort were proceeding along the highway. The American government contended that in view of the conditions of insecurity which prevailed in the region, as shown by the fact that other foreigners had recently been murdered in that neighbourhood, the protection afforded was inadequate and the measures taken to apprehend and punish the guilty parties, whose names were known to the authorities, were insufficient. The Commission held that, considering the difficulty of preventing attacks of this kind even by the most efficacious measures, it could not be said that the lack of protection in this case constituted a basis for a claim for damages. But the charge of failure to apprehend and punish the guilty parties was sustained. Several persons accused of the crime were arrested and proceedings were begun against them but they were released by order of the court. Upon appeal by the prosecuting attorney the decree which released them was revoked and they were rearrested, but the prosecution was not continued. The Commission held that, six years having elapsed without judgment, there had been a failure of justice for which Mexico was liable. The claimant was therefore awarded \$9,000 without interest.

In the case of *Salomé Lerma de Galvan*² the United States was condemned to pay the Mexican government \$10,000 on account of the murder in the State of Texas of a Mexican citizen. The Commission found that there was unnecessary delay in the prosecution of the offender and consequently a denial of justice under the general principle of international law which requires the public authorities to take proper measures to apprehend and punish crimes committed against aliens. The accused was indicted but he was not prosecuted although there were five eye-witnesses to the shooting.

The Same—Responsibility for the acts of military forces.

In the case of *Stephens and Stephens*,³ Mexico was condemned to pay the United States \$7,000, without interest, on account of the killing of an American citizen by certain Mexican guards or auxiliary forces who fired upon him while he was travelling in a motor-car. The guard or soldier who caused the death of the victim was arrested by the civil authorities but was handed over to the military authorities at their request and was later released and was never prosecuted. The United States alleged that Mexico was liable in damages for the killing, for not protecting the victim and for not prosecuting the guilty party, and the Commission so held. The guard who fired the shot claimed that he did so in the effort merely to halt the car in which the victim was travelling and with

¹ *Opinions*, p. 412.

² *Ibid.*, p. 408.

³ *Ibid.*, p. 397.

no intention of killing him. As to this the Commission held that the authority of the guard, conferred by the army regulations, to stop passengers on the highway was not executed properly, and that there was a reckless use of his firearms in this case, for which Mexico was liable.

There was some question as to whether the guards belonged to the federal or state military organization, but the Commission did not regard this as material since they were acting for Mexico or its political sub-divisions. A claim, in addition to direct damages, was made by the elder brother of the victim for remote pecuniary loss sustained owing to the fact that he contributed to the support of an aged and dependent aunt. The youngest brother, who, since the killing of his brother, had suffered from melancholy or some mental disorder also claimed damages although he had suffered no direct financial loss. The Commission pointed out that on several occasions awards had been made by international tribunals for indignity or grief suffered, in addition to compensation for material losses, and it thought the claimants in this case were entitled to satisfaction of this kind. Instead, however, of making an additional award to cover such claims the Commission included it in the total sum allowed.

Responsibility for illegal imprisonment and delay of proceedings.

In the case of *Mary Ann Turner* ¹ an award of \$4,000 was made on behalf of the widow of an American citizen who was arrested in Mexico on the charge of responsibility for a train collision, was imprisoned and died in jail without having been brought to trial. The United States alleged that the arrest was illegal, that there was undue and illegal delay of proceedings and inhuman treatment of the prisoner, all of which contributed to his death. The Commission held that the charge of illegal arrest was not proven, but it sustained the charge of undue delay in the proceedings and held that on the basis of Mexican law the victim was illegally held in jail for a period of more than six months. The illness from which he died having begun during the period of illegal custody, even though there was no convincing proof that death resulted from bad treatment during such custody, Mexico was responsible for the "bad effect of its illegal and careless custody" on the prisoner's health. "If having a man in custody obligates a government to account for him, having a man in *illegal* custody doubtless renders a government liable for dangers and disasters which would not have been his share, or in a less degree, if he had been at liberty."

Denial of Justice—Responsibility for acts of local officials—"Special Protection" of Consul.

In the case of *Francisco Mallén* ² the Mexican government claimed \$200,000 with interest, as compensation for damages and satisfaction for the alleged illegal acts of an American official, including an unwarranted arrest, lack of protection and denial of justice in connexion with two assaults on a Mexican consul at El Paso, Texas. The official in question was a local deputy constable who brutally assaulted the consul while on a street car, and although the assault was apparently an act of private revenge it was the act of an official while on duty. The constable was neither punished nor warned that he would be discharged in case he again disturbed the peace which he was appointed to protect. A second attack of the same kind was later made upon the consul for which the constable was fined \$100 but which apparently he never paid. Shortly before

¹ *Opinions*, p. 416.

² *Ibid.*, p. 254.

the second assault the constable's appointment was cancelled, but a few months following the second attack he was reappointed as a deputy sheriff. The Commission did not think the imposition of a fine of \$100, being within the limits of the criminal law, amounted to a denial of justice because of its moderate amount, but it held that the reappointment and continuance in office of so dangerous an official as the constable in this case constituted a lamentable failure of protection by the public authorities.

The question was raised in this case as to whether consuls are entitled to a "special protection" for their persons. On this point the Commission said:

"The answer depends upon the meaning given these two words. If they should indicate that, apart from prerogatives extended to consuls either by treaty or by unwritten law, the government of their temporary residence is bound to grant them other prerogatives not enjoyed by common residents (be it citizens or aliens), the answer is in the negative. But if 'special protection' means that in executing the laws of the country, especially those concerning police and penal law, the government should realize that foreign governments are sensitive regarding the treatment accorded their representatives, and that therefore the government of the consul's residence should exercise greater vigilance in respect to their security and safety, the answer as evidently shall be in the affirmative."

The Commission quoted with approval the following from the Annual Message of President Fillmore in 1851:

"Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. . . . Ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station."

The conclusion of the Commission was that the personal security referred to by President Fillmore had not been provided by the authorities in this case and that the State of Texas was responsible for the second assault. As the claimant was a foreigner the responsibility must be assumed by the United States. The large sum claimed included salaries which the consul stated that he might have earned had it not been for the injuries sustained by him, losses because of retirement from all activities, losses on account of doctors' bills, satisfaction for indignity suffered, &c. As to the latter claim the Commission said:

"While recognizing that an amount should be added as satisfaction for indignity suffered, for lack of protection and for denial of justice, as established heretofore, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honour was involved, or to consuls in backward countries where their position approaches that of the diplomat. The Permanent Court of Arbitration at The Hague in its award of May 22, 1909, in the case of the deserters at Casablanca twice mentioned 'the prestige of the consular authority' or 'the consular prestige', but especially with reference to conditions in Morocco as they were before France established its protectorate."

Taking all these considerations into account the Commission fixed the amount of the award at \$18,000. The Mexican commissioner delivered a separate opinion in which he maintained that the ill health and loss of hearing in one ear which the claimant suffered as a result of the assault entitled him to compensation in addition to that awarded on the other grounds.

In the case of *Margaret Roper*,¹ Mexico was condemned to pay the United

¹ *Opinions*, p. 205.

States \$6,000 on behalf of the mother of an American seaman who was drowned as a result of an unlawful attack upon him and three fellow seamen, while attempting to rejoin their vessel. The assault was committed by Mexican policemen and private citizens. The United States alleged that there was also denial of justice due to the failure of the authorities to investigate in an adequate manner the circumstances of the crime and to prosecute and punish the guilty parties. On behalf of Mexico it was argued that the Mexican government was not responsible under international law for the acts of such minor officials as policemen. The Commission had already decided the year before in the *Quintanilla case*,¹ where the Mexican government had contended that the government of the United States was responsible for the acts of a deputy sheriff, that a government is responsible for the acts of such officials. In the present case the Commission held that the same responsibility covered the acts of policemen. This view was justified by the general language of the Convention providing for the creation of the Commission, which gave it authority to hear "all claims for losses or damages originating from acts of officials or others acting for either government and resulting in injustice".

Similar awards were made in the identical cases of *Mamie Brown* and *Rosetta Small*.²

Denial of Justice—Failure to punish guilty party allowed to escape from prison.

The question of responsibility for the acts of minor officials was also raised in the case of *Gertrude Parker Massey*,³ mother of an American citizen who was killed in Mexico. The claim was founded on an alleged denial of justice growing out of the failure of the Mexican authorities to take adequate measures to punish the slayer of the American. The guilty party was captured and confined in prison from which he was permitted by the assistant jail-keeper to escape. He was never reapprehended. Mexico contended that a state is not responsible for a denial of justice when a private individual, who is under indictment or prosecution for the killing of an alien, is allowed to escape by a minor municipal officer in violation of law and of his own duty, if the state immediately disapproves of the act by arresting and punishing the officer and takes reasonable measures for the apprehension of the fugitive. This contention was rejected by the Commission although it admitted that an examination of the opinions of international tribunals dealing with the question of a nation's responsibility for the acts of minor officials revealed conflicting views. The opinion was expressed by Mr. Nielsen, speaking for the Commission, that "it is undoubtedly a sound general principle that whenever misconduct on the part of any such persons [persons in the service of the state], whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants". In the present case the Commission found that there had been gross negligence on the part of the Mexican authorities resulting in denial of justice. The punishment of the jail-keeper who permitted the guilty offender to escape did not relieve Mexico from responsibility. An incidental point decided was that the private character and conduct of the victim—grave charges as to his moral character were made—was irrelevant to the merits of the claim for an indemnity for denial of justice. The claimant was awarded \$15,000.

¹ *B.Y.B.I.L.* for 1927, p. 185.

² *Opinions*, pp. 211, 212.

³ *Ibid.*, p. 228.

Another case involving denial of justice resulting from the escape of the guilty party from prison and failure to apprehend and punish him was that of *Ida Robinson Smith Putnam*,¹ the claimant of an indemnity of \$53,000 for the murder of her son by a Mexican policeman. The offender was tried, convicted of homicide and sentenced to death. Upon appeal the higher court reduced the sentence to eight years' imprisonment at hard labour. Shortly thereafter he was liberated from prison to defend the town against attack by Revolutionists. He was later reapprehended and committed to jail from which he was again liberated by a colonel of the constitutionalist forces who were then in control of the northern part of Mexico and he was never again apprehended and compelled to serve out the remainder of his sentence, amounting to more than five months. The United States contended, in the first place, that the sentence as reduced by the higher court was not in proportion to the gravity of the offence. As to this contention the Commission held that the commutation of the sentence from death to eight years' imprisonment at hard labour was not in itself a denial of justice for which Mexico was liable. "Only a clear and notorious injustice", said the Commission, "visible at a mere glance could furnish ground for an international arbitral tribunal . . . to put aside a national decision presented before it and to scrutinize its grounds of fact and law." The United States contended, in the second place, that the Mexican government entirely failed in its obligation to punish the murderer, since he was allowed to escape from jail and was never again apprehended. The Commission unanimously adopted this view and held Mexico responsible for denial of justice resulting from such failure. The claimant was awarded \$6,000 without interest.

Responsibility for murder by bandits—Effect of amnesty.

In the case of *F. R. West* ² a claim was made by the United States for \$25,000 in damages on account of the wanton murder of the claimant's son by Mexican bandits who were thereafter granted amnesty by the Mexican government and were never prosecuted or punished. Mexico contended that the offenders could not be prosecuted because their crimes were within the scope of the Amnesty Act. The Commission held unanimously that the granting of an amnesty has the same effect under international law as failure to punish. The claimant was therefore awarded \$10,000 without interest.

In the case of *T. J. Snapp* ³ the facts were the same and a similar decision was reached.

Responsibility for collision—Presumption of culpability.

In the case of *George W. Johnson, A. P. White and Martha J. McFadden* (the "*Daylight*" case),⁴ the United States claimed damages on behalf of the owners of the American schooner *Daylight*, which, while at anchor outside the bar at Tampico in 1882, was wrecked in a collision with the Mexican gunboat *Independencia*, as a result of the alleged culpable negligence or faulty seamanship on the part of the gunboat. Evidence as to fault on either side being conflicting and inconclusive the Commission undertook to determine whether some special rule as to the burden of proof or presumption could be invoked. It cited the *Queen* case between Brazil and Norway (1870), where the arbitrator used as a basic rule the general principle that the burden of proof in collision cases is incumbent upon the claimant government (Laprédelle et Politis, *Recueil*, II, 708). In the

¹ *Opinions*, p. 222.

² *Ibid.*, p. 404.

³ *Ibid.*, p. 407.

⁴ *Ibid.*, p. 241.

William A. Parker case¹ the Commission had already held, however, that this rule as to burden of proof was inapplicable to its proceedings (*B.Y.B.I.L.*, 1927, p. 183). The Commission added: "As to whether in case of collision between a ship at anchor and a ship under way [as in the present case] the burden of proof by way of exception falls on the latter one, it may be stated that such a rule of evidence, where it exists, is usually considered and construed rather as a presumption of fault on the part of the ship under way, than as a rule concerning evidence." The United States contended that such a presumption in favour of ships at anchor, and also the presumption in favour of sailing ships when colliding with steamers, are presumptions recognized by universal maritime law, and should be applied by the Commission in this case. Mexico, on the other hand, contended that since the collision occurred in Mexican waters, the law of Mexico was applicable and at the time the collision occurred it recognized no such presumptions as those mentioned above. The Commission adopted this view and cited in support of it the *Sidra* case, where the British-American Mixed Claims Commission held that "according to the well settled rule of international law, the collision having occurred in the territorial waters of the United States, the law applicable to the liability is the law of the United States" (Nielsen's Report, 457). A resolution of the *Institut de Droit International* at its session of 1888, and the opinions of MM. Lyon-Caen and Renault to the same effect, were also cited. No evidence was produced to show that either commander or captain was guilty of culpable negligence or unskilful navigation and there being no presumption or specific rule concerning the burden of proof in the law of Mexico at the time the collision occurred, such negligence could not be assumed. The failure of the commander of the gunboat to render aid to the crew on the ship, although he knew that his ship had seriously damaged the American schooner, however reprehensible his indifference in this respect, did not in itself create a legal presumption of culpability for the collision. For these reasons the claim was disallowed.

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WORK OF THE GERMAN-AMERICAN MIXED CLAIMS COMMISSION

The work of the Mixed Claims Commission appointed in pursuance of the agreement of August 10, 1922, between the United States and Germany, the more important decisions of which have been summarized in previous volumes of this *Year Book*², has been in large part completed. The following table shows the amount of awards made down to January 23, 1928, on behalf of the United States Government or American nationals and the estimated awards yet to be made:

1. Awards on behalf of American nationals (principal and interest)	\$159,928,161
2. Awards to be entered (principal and interest estimated)	31,800,000
Total	\$191,728,161
3. Awards on behalf of the United States Government (principal and interest)	61,238,567
Aggregate of awards entered and to be entered (estimated)	\$252,966,728

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¹ *Opinions*, p. 35.

² For 1924, pp. 222 ff.; for 1925, pp. 204 ff.

THE TRIPARTITE CLAIMS COMMISSION—UNITED STATES,
AUSTRIA, AND HUNGARY

By an agreement which became effective December 12, 1925, between the United States, Austria, and Hungary, Judge Edwin B. Parker, who had served as umpire of the German-American Mixed Claims Commission under the Agreement of August 10, 1922, between the United States and Germany, was selected as sole commissioner to hear and determine the following categories of American claims against Austria and Hungary :

(1) "Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of their property, rights, and interests, including any company or association in which they are interested, within the territories of either the former Austrian Empire or the former Kingdom of Hungary as they respectively existed on August 1, 1914 ;

(2) "Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to or death of persons, or with respect to property, rights, and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war ;

(3) "Debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals."

Following the procedure adopted by the German-American Commission, Judge Parker rendered on May 25, 1927, two administrative decisions, announcing the general principles which he proposed to apply in rendering decisions in all cases submitted to him, defining the functions and jurisdiction of the commissioner and dealing with debts and claims arising under the economic clauses of the treaties of peace between the United States and Austria and Hungary. The rules announced as to espousal and control of claims filed with the government of the United States, the nationality of claims and the jurisdiction of the commissioner were substantially the same as those applied by the German-American Commission (see *B.Y.B.I.L.*, 1924, p. 222).

As to claims for debts owed by Austrian or Hungarian nationals to American nationals, the Austrian and Hungarian agents contended that their governments were not primarily and directly obligated to pay such debts as were due to American nationals who had not been subjected in Austrian or Hungarian territory to exceptional war measures (such as sequestration of enemy alien property); that with respect to debts due in other than American currency, creditors were not entitled to payment in American currency at the pre-war rate of exchange ; that they were not entitled to interest ; and that debts owed by the Austrian or Hungarian governments or their nationals did not constitute a charge upon the private property of Austrians or Hungarians held by the American custodian of enemy property.

The commissioner sustained the contention that Austria and Hungary were not liable for private debts due to American nationals or for their valorization at the pre-war rate, unless Congress should provide that the proceeds of the liquidation of Austrian and Hungarian property held by the alien property custodian should be applied to the payment of such debts.¹

More than half of the claims filed with the commissioner have been disposed

¹ The solution to which this decision leads is criticized by Professor E. M. Borchard, *Amer. Jour. of Int. Law*, Jan. 1928, p. 145.

of and it is estimated that the aggregate of the awards against Austria will not exceed \$3,000,000, and against Hungary not more than \$1,000,000.

The amount of property belonging to Austrian nationals held by the alien property custodian slightly exceeds \$12,000,000, that of Hungarian nationals less than \$1,000,000. The government of Austria has proposed that it be allowed to deposit with the United States a sum sufficient to pay all awards against it, and that the property belonging to Austrian nationals now held by the alien property custodian be returned to them. It is understood that the government of Hungary is willing to do likewise. The Act of Congress referred to in a separate note ¹ provides for the return in full of all such property as soon as the Austrian and Hungarian governments have paid to the United States a sum sufficient to cover the awards of the Commission in favour of the United States.

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¹ See p. 129 *supra*.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

DIGEST OF THE DECISIONS OF THE ENGLISH COURTS DURING THE YEAR 1927

*Introductory Note.*¹

IN the *Fagernes* (1) the Court of Appeal unanimously reversed the decision of Hill J. that the Bristol Channel is an inlet within the territorial jurisdiction of the British Crown as far west as a line from Bull Point to Port Eynon Head, where the opening is twenty miles wide. This case is considered elsewhere from the point of view of international law.² From the point of view of English law perhaps the most important aspect of the case was the appearance in the Court of Appeal of the Attorney-General on behalf of the Crown, and his statement to the Court that the Crown did not claim jurisdiction to this extent, and the view taken by the Court as to the effect of such a statement. Atkin L.J., and it seems also Lawrence L.J., considered that such a statement was conclusive. Bankes L.J., on the other hand, did not think it was conclusive, but of great weight and to be followed in the absence of contrary authority. Bankes and Lawrence L.JJ. stated that they would still have come to the same conclusion if no such statement had been made, and thought that Hill J. had given too wide an interpretation to the statements in *Cunningham's* case. Atkin L.J., on the other hand, would have come to the opposite conclusion.

There were two cases in the period under review on the application of the Economic Clauses of the Treaties of Peace.

The first, *The Bohemian Union Bank v. Administrator of Austrian Property* (2) is a decision interpreting the Treaty of St. Germain, in which it was held that companies, as well as individuals, might acquire *ipso facto* the nationality of an Allied or Associated Power under that treaty, and in particular under Article 70, as persons who possessed "rights of citizenship" in transferred territory.

The view taken by Clauson J. in this case, that former Austrian companies situated in Czechoslovakia became Czechoslovakian nationals under Article 70, enabled him to decide in favour of the company without conflicting with the decision of Eve J. in the *Rothschild* case (see the *Year Book* for 1926 at p. 217).

One of the plaintiff's arguments, with which the judge did not feel called upon to deal, was that this decision was wrong and that the proviso to Article 249 (6) of the treaty included not only persons covered by the nationality articles of the treaty (Section VI of Part III), but also all persons who acquired a new nationality of an Allied or Associated Power, whom Austria, in Article 230, undertook to release from Austrian nationality. It was argued that if that was not the case such persons were worse off than persons who remained Austrian, because their property was charged in England and they could not claim compensation from Austria.

¹ The numbers in brackets following the names of cases in the introductory note refer to the number of the case in the digest which follows. All cases reported in the Law Reports and contemporary reports are reviewed.

² See p. 120.

The second case, *Josef Inwald v. Pfeiffer* (3), shows that under the English Orders in Council, made to carry out the provisions of the Peace Treaties charging enemy property and interests, an ex-enemy national is deprived of all right of suing for a debt which is charged and, if the English Administrator is unwilling to bring an action, cannot sue the debtor for the purpose of establishing a claim to compensation against his own government.

The next three cases are all interesting instances of the application, in widely different circumstances, of the same general principle. The principle is one which comes in a sense at the point where Public and Private International Law meet, and in its most general form may be stated as follows :

"A country has no jurisdiction over property situated in another country." As a principle of English Private International Law it may be put thus :

(1) The English courts will not recognize that the legislation of a foreign country, or anything done under such legislation, can affect property not situated in that country.

(2) The English courts will not exercise jurisdiction in respect of property situated in a foreign country, nor apply English law to such property.

There are exceptions to this principle no doubt, but this is not the place to discuss them.

In two of the cases which follow, the "foreign country" is another part of the British Empire, so that in these actual instances there is no question of Public International Law ; but in Private International Law it has always been the practice of the English courts to treat all countries not within their own jurisdiction "as foreign countries" and to apply the same principles to them, whether the case deals with Scotland, a colony, a Dominion or a foreign state, uninfluenced by political considerations.

The first case, the *Jupiter* (4), is the third of a series of cases dealing with the same ship, and contains, in addition to some interesting findings of fact on the situation in South Russia in the earlier days of the Russian revolution, judicial pronouncements on three points of principle :

- (1) that nationalization decrees of a foreign state do not affect property which is situated outside its territory, whether the property is that of nationals of that state or not ;
- (2) that if a foreign company is liquidated and ceases to exist under legislation of the country in which it is incorporated, and its property is confiscated, the property of that company situated abroad becomes property without an owner and capable of appropriation by the first occupier ;
- (3) that there is no principle recognized in English law that statements of a foreign sovereign as to the ownership of property or any other question of law or fact must be conclusive in the English courts. There is, however, a principle that a foreign sovereign and his property possess immunity from the jurisdiction of the courts and this immunity may make it impossible to challenge a claim by a foreign sovereign that the ownership of property is vested in himself when proceedings directed against such property are in question. Except in such cases the statements of a foreign sovereign as to the ownership of property are not in themselves even evidence of ownership.

The second of these cases, *Richardson v. Richardson* (5), another decision of Hill J., turned on two points of principle :

- (1) that the English courts will not make orders for execution on property outside their jurisdiction, and
- (2) that a debt—as a species of property—is to be deemed to have a local situation.

The situation of a debt is primarily the place where the debtor may be found, as being the place where it may be enforced, but in cases where the debtor may be sued in more than one place it may be further localized at one of those places and, where the debtor is a corporation with branches in different countries, it may be localized in one of those countries. It was held in this case that a credit balance standing to the credit of a customer in a branch of an English bank in a foreign country is a debt from the bank situated in the country where that branch is, and is not attachable under a garnishee order of the English courts for the execution of an English judgment.

The London and South American Investment Trust Co. case (6), which is the third, is really the reverse aspect of the first point in the *Richardson* case. There was a debt which was held to be situated in England and the court held that its payment was not discharged by a payment made in Australia by the debtor under the compulsion of Australian law to satisfy a claim against the creditor in that country. It had not in fact been attached under garnishee proceedings, but under an assessment on the creditor for income tax made payable out of the debt in the hands of the debtor. The principle is, however, the same, as counsel for the debtors, who were defendants, argued, but the defendants failed because they were unsuccessful in their contention that the debt was situated in Australia. The debt was a dividend declared in Australia on shares, transferable only on a register in England, in an English company whose head office was in Australia. The Court held that the obligation to pay the dividend was a debt whose locality must be the same as that of the shares, and there was authority that in such a case the shares must be deemed to be situated in England.

The decision of the House of Lords in *Salvesen v. Administrator of Austrian Property* (7) is very bold and far reaching in its statement of principle. It resembles in many respects the first decision of the Court of Appeal in *Sottomayer v. de Barros* and an interesting subject of speculation is presented in the question whether, like that case, it will be followed by a reaction cutting down the extent of its application.

The decision on the facts was : (1) that a foreign court is a court of competent jurisdiction to declare null and void, on the ground of informality of celebration, a marriage celebrated in a third country, if the parties are, at the time of the suit, domiciled within its jurisdiction, and (2) that a decree of nullity pronounced by a competent court is a judgment in a matter of status, and its effect, like a judgment *in rem*, must be recognized everywhere.

It was a decision in a Scottish case and the question arises as to the extent to which it can be regarded as an authority on English law, particularly in view of the fact that as Scottish law does not recognize in nullity suits any jurisdiction based upon the *locus celebrationis*, the jurisdiction of the foreign court of the domicile does not appear to have been contested by the respondent in the House of Lords. The speeches of the Law Lords, however, are not only mainly devoted

to this question of jurisdiction on which a clear decision was given, but are also based almost entirely on a review of English (there being a dearth of Scottish) authorities. Indeed the conclusion is arrived at by ascertaining what the English law is and then seeing if there was any reason to suppose that Scottish law is different.

The importance of the decision in English Private International Law can best be appreciated by a reference to Dicey's *Conflict of Laws*, 4th edition, Rule 100, which may be taken as presenting the most probable conclusions to be drawn from the English authorities up to that time :

"The courts of a foreign country have jurisdiction to declare the nullity of any marriage celebrated in such country, but not to declare on the ground of informality of the celebration the nullity of any marriage celebrated in England and valid by English law."

In the first place the rule says nothing about jurisdiction based upon domicile, and the author says that this is at present uncertain, though he notes (1) that the English and Irish courts have exercised jurisdiction based on domicile to pronounce on the validity of a marriage both in relation to matters of capacity (*Johnson v. Cooke*, 2 Ir. R. 130, one party already married), and of form (*Ruding v. Smith*, 2 Hagg., Cons. 371) ; and (2) that the competence of a foreign court of the domicile where the objection to the marriage was based on impotence, had been recognized (*Turner v. Thompson*, 13 P.D. 37), but (3) that there was considerable English authority against the jurisdiction of a foreign court of the domicile in relation to matters of form.

The House of Lords have now held that a foreign court of the domicile is competent to pronounce on the validity of a marriage not only in matters of capacity, but also in matters of informality of celebration. They go farther and say that the question being one of status the courts of the domicile have primary jurisdiction in the matter. The previous English authorities on this point, which were distinguished or overruled, are noted in the digest of this case.

The House of Lords were dealing with a marriage celebrated in France and the Law Lords did not have to deal with "a declaration of nullity by a foreign court of a marriage celebrated in England and valid by English law", but all the authorities for this statement in Dicey's rule were either distinguished upon grounds which had nothing to do with the fact that this marriage was celebrated abroad or else overruled. It is at least doubtful whether this last branch of Dicey's rule is good law. If it is, it would appear that it must be based on public policy (i.e. on the ground that such a decision of a foreign court, though a decision of a court of competent jurisdiction, cannot be recognized in England on grounds of public policy).

The first part of Dicey's rule, that the foreign court has jurisdiction based on the *locus celebrationis*, is supported by certain old English authorities, and the English courts themselves have exercised such jurisdiction. Lord Haldane carefully refrained from deciding whether the jurisdiction of the courts of the domicile is exclusive, but Lord Phillimore said that he thought that it was, but it is possible that the fact that this is a Scottish appeal has some bearing here, because the Scottish courts know no jurisdiction based on the *locus celebrationis*.

The case would seem to warrant a rewriting of Dicey's rule on something of the following lines :

"The courts of a foreign country where the parties are domiciled have jurisdiction to decree the nullity of any marriage, wherever celebrated, either on grounds of incapacity or of informality of celebration.

"*Quaere* whether courts of a foreign country where the parties are resident have such jurisdiction.

"*Quaere* whether the English courts will recognize a foreign decree declaring, on the ground of informality of celebration, the nullity of a marriage celebrated in England and valid by English law.

"*Quaere* whether the courts of a foreign country have jurisdiction to declare, on ground of informality of celebration, the nullity of a marriage celebrated in such country."

The reversal of the position is most remarkable.

The case of the *Republica de Guatemala v. Nunez* (8) deals with the validity of an assignment in Guatemala between two persons both domiciled in Guatemala of a debt locally situate in England, the assignment being good by English law but invalid in Guatemalan law on account (1) of the incapacity of the assignee to receive it on account of infancy ; (2) of the non-fulfilment of formalities. It raises points of Private International Law on which clear authority is very much needed in English law. The case was decided by Greer J. in the first instance and went to the Court of Appeal, but, though all four judgments in the case were unanimous in holding this assignment to be invalid, the grounds on which this conclusion is reached are so different that on many points the law remains in the same state of uncertainty.

The validity of the assignment was challenged (1) on account of the incapacity of one of the parties ; (2) on account of non-fulfilment of formalities, and in each case three principles for determining the law which was applicable might be invoked : (a) *lex domicilii* ; (b) *lex loci actus* ; (c) *lex loci rei sitae*.

In this case (a) and (b) were the same, i.e. Guatemalan law, and in most of the cases on this point it has happened that (b) and (c) were the same—both circumstances which hinder the determination of the principle properly applicable.

To take first the question of capacity. Neither Greer J., nor, in the Court of Appeal, Bankes L.J., deals with this point, but Scrutton and Lawrence L.JJ. both agreed that the capacity of the person to transfer or accept the transfer of property was governed *either* by the *lex loci actus* or the *lex domicilii*—that the authorities were unanimous so far but conflicting as to which of the two principles applied and that, as in this case they were the same law, it was unnecessary to decide that question.

Both L.JJ. agreed, however, that in the case of the transfer of movable property capacity was not determined by the *lex situs* of the property, and that in so far as the rule in Dicey's *Conflict of Laws*, to the effect that a transfer of property good by the *lex situs* is valid, indicated a contrary view, it was too widely stated. This clear opinion on this point is valuable.

On the question of form, Greer J. was of the opinion that where the *lex domicilii* and *lex loci actus* were the same, that law applied and not the *lex situs*. He did not indicate any view as to which of the two was the right principle or what would apply if they were different. Bankes L.J. said he agreed with the judgment of Greer J. and his judgment does not appear on this point to carry the question any farther, but there are passages in which he seems to treat the matter as a question of priorities which it is not easy to follow.

Scrutton L.J. expresses a clear opinion in favour of the *lex loci actus* and calls attention to the fact that in a previous case where the *lex domicilii* and *lex loci actus* had been different the *lex loci actus* had been adopted. He treats an assignment as being on the same footing as a contract to assign. If the transaction is void by the *lex loci actus* or *contractus* there is no transaction at all.

It is on this point that Lawrence L.J. differed from him. Admitting that Scrutton L.J.'s view may be correct as regards a contract, he considered that an assignment or transfer is different in character and governed by different rules from a contract. He held that an assignment of a single debt or the transfer of an individual piece of movable property (as opposed to general assignments) is governed as regards form by the *lex situs* and (it would appear from his reasoning) exclusively by the *lex situs*, and he considered that this principle was well established in English law.

On the second point therefore, though the judgments contain some illuminating discussion, the case, in view of the difference of opinion, is hardly an authority either way.

The Court of Appeal were unanimous on one point which had been left in some doubt by Greer J.—whether a debt or chose in action can be legally said to have a local position or *situs*—and rejected arguments that the cases under which a debt had been held to have a locality were confined to revenue matters or cases under the Peace Treaties and were not of general application. The case, therefore, proceeded in the Court of Appeal upon the footing that the principles applicable to the transfer of choses in action and movable property were the same. Since the decisions in two other cases already referred to (5 and 6) turned upon the recognition that a debt has a *situs*, it is clear that this has now become a generally recognized principle.

The case *In the estate of Abdul Majid Belshah* (9) is of some interest as showing that an English court recognizes the polygamous unions of a person by the law of whose domicile such unions are admitted, as being capable of supporting rights of succession to property upon the part of the wives and children of such unions.

This was the question which the Court in *Hyde v. Hyde* carefully left open. In that case Lord Penzance said that he did “not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that was then decided was that, as between each other, they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England”. In *In re Ullee* (54 L.T. [C.A.] 286) the Court had recognized the right of the father of children of such a union to appoint guardians for them in preference to the right of the mother who, if they had been regarded as illegitimate, would have had the right of guardianship. Dicey (3rd edition, at p. 290), however, says it is impossible to say what measure of recognition can be given to them by the English courts, but Nelson (*Private International Law*, at p. 88) was of the opinion that where the parties are domiciled in a foreign country the court will give effect to the law of the domicile as regards the proprietary rights of the parties resulting from the union that they have contracted, and distinguishes *In re Bethell* on the ground that the father in that case, who contracted a polygamous union, was domiciled in England (i.e. a country whose law gave no proprietary rights to the wives or children of such unions). The new

decision is in accord with Nelson's view, and though it is not of great authority, since it was settled by consent, it is noteworthy that, if the view had been taken that these unions could not be recognized at all, the result would have been that none of the parties before the Court had any claim and the property should have gone elsewhere, presumably to the Crown as *bona vacantia*. Yet this was never suggested by the Court.

In the case of *F. Koechlin & Cie v. Kestenbaum Bros.* (10), Rowlatt J., basing his judgment on the Bills of Exchange Act, 1882, held that where a bill of exchange (other than an inland bill) had been accepted in England and endorsed abroad it was necessary, in order that the English acceptor could be sued on an endorsed bill, that the endorsement should fulfil the requirements both of English law and of the law of the country where the endorsement was made. The Court of Appeal reversed this decision and decided that it was only necessary that it should be good by the law of the country where the endorsement was made. The Court of Appeal further held that the Bills of Exchange Act gave effect, as regards the transfer of bills of exchange by endorsement, to the general principle of private international law that the transfer of chattels is governed by the law of the country where the transfer takes place. It may be noted, however, with reference to the difference of opinion in the *Guatemala case* (8) that in these cases the *lex loci actus* and the *lex situs* must always be the same.

In the case of *Société Anonyme des Grands Établissements du Touquet Paris-Plage v. Baumgart* (11), Shearman J. decided two points which were not hitherto covered by precise authority : (a) that money lent in and for purposes of gaming in a foreign country where such games are lawful is recoverable in England. The previous case of *Saxby v. Fulton* dealt with money lent to pay gaming debts already incurred ; (b) that the fact that a cheque is given whose consideration is made illegal by the Act of 1835 does not prevent the transaction being sued upon as a loan.

The decision of Mackinnon J. in the *Norske Atlas Insurance Company* case (12) is of considerable interest as showing (1) that an action can be brought in the English courts on an arbitral award given in a foreign country, in the same way as an action can be brought on a foreign judgment, and (2) the conditions which the party relying upon the award must satisfy in order to succeed.

In *Tallack v. Tallack* (13) the court held that it had no jurisdiction to order a person, whose marriage had been dissolved in the English courts and who had since become domiciled abroad and possessed no property in this country, to make a settlement for the benefit of children of the marriage.

The *Kwik Hoo Tong* case (14) contains an interesting interpretation by the House of Lords of the words " a contract . . . by its terms or implication to be governed by English " law " in the rules of the Supreme Court relating to service out of the jurisdiction (Order XI, Rule 1 (e) iii).

It was held that a contract containing a submission to English arbitrators was a contract to be " governed by English law ", although it was recognized that it might partly be governed by the law of Java or Bombay. The decision, though expressed differently, seems to come to this—that a submission to an English forum implies that the contract is to be governed by English Private International Law at any rate, if not necessarily English internal law, and the words of the rule " English law " include " English Private International Law ".

It is rather extraordinary that the rules for service out of the jurisdiction,

which contain in general such very wide provisions, do not provide in terms for the most natural case of a contract containing an express submission to the English courts. However, the House of Lords have arrived at this result in another way by their interpretation of Order XI, Rule 1 (e) (iii).

In the case of *Sabatier v. The Trading Company* (15) Clauson J. expressed the view that under Section 274 of the English Companies Act, 1907, if a foreign company once establishes a place of business in the United Kingdom it becomes its duty to keep on the register the name of a person in the United Kingdom authorized to accept service on its behalf, even if it ceases to carry on any business in the United Kingdom, and that service on such a person is a good service on the company. This opinion seems to be in accord with the view of the majority of the House of Lords in the *Employers' Liability Corporation case* (noted in the *Year Book* of 1927 at p. 199) who went further and expressed the view that the jurisdiction exercised by the English courts against a foreign company (no longer carrying on business here) by virtue of a service upon such a person, was justifiable under the rules of Private International Law on the ground that by establishing a place of business in this country under the conditions laid down by Section 274, the foreign company must be held to have submitted to the jurisdiction of the English courts to the full extent to which, under Section 274, the English courts acquire jurisdiction over them. In that case, however, this view was only one of two alternative grounds for the decision. It certainly extends the implied submission very far, and Lord Blanesburgh strongly dissented from it, holding that Section 274 was not intended to give the courts any new jurisdiction but only to provide an alternative and convenient method of service in cases where, according to general principles, the courts had jurisdiction.

1. *The Fagernes*. 1927. P. 311 (C.A.).

In March 1926 a collision took place in the Bristol Channel between the *Cornish Coast*, whose owners were the plaintiffs, and the *Fagernes*, owned by the defendants, an Italian corporation carrying on business in Genoa. The *Fagernes* was sunk. The *Cornish Coast* was injured. The plaintiffs alleged that the cause of the accident was the negligence of the *Fagernes*. If proceedings were brought in England the plaintiffs had the possibility of recovering damages limited to £8 a ton. If they were brought in Italy the damages would be limited to the value of the *Fagernes*, which was on the bottom of the sea.

The plaintiffs' claim was clearly within the jurisdiction of the Admiralty Division of the High Court under section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, wherever the collision took place, as being one for damage received by a ship and damage done by a ship. Nevertheless, the plaintiffs, being unable to take proceedings *in rem* against the *Fagernes*, which was sunk, and being therefore compelled to proceed *in personam* against her owners, the defendants, who were in Italy, had to obtain leave to serve a writ out of the jurisdiction and for this purpose to bring their case under one of the rules of Order XI. Leave was granted under Order XI, Rule 1 (ee), which allows leave to be granted when "the action is founded on a tort committed within the jurisdiction". The defendants appeared conditionally and applied to set aside the order on the ground that the collision did not take place within the jurisdiction.

There was no material difference between the parties as to the actual spot at which the collision occurred. It was at a spot where the channel is about 20 miles across—10½ miles from the English coast at Ilfracombe and 9½ from Wales at Oxwich Head.

Hill J. held that this spot was "within the jurisdiction of the Court".

On appeal to the Court of Appeal the L.J.J. were of the opinion that the case raised issues of public interest on which the Crown might desire to be represented, and the case was adjourned for the attendance of the Attorney-General.

The Attorney-General appeared and argued as follows :

“ There is no recognized rule of international law on the question, and it is not desirable that the Court should lay down any principles unless bound so to do. The high seas, however, should be as wide as possible. It is clear that at least so much as is within a six-mile line drawn from shore to shore is *inter fauces terrae*, and such waters are national as distinct from territorial. It is conceded also that whenever a country has possessed itself of a bay or gulf over which it has effectively asserted dominion, such waters, although considerably wider, may become the territory of that country.”

He then discussed the various authorities on this question, including both writers on International Law and cases decided in the Courts, and concluded :

“ It is apparent, therefore, that there is no recognized rule. It is submitted, however, that at any rate where the width of the waters is over *twelve* miles, unless there is evidence that the littoral country has established definite dominion over them there is no effective sovereignty. In the present case there is no evidence of appropriation, and if the Court wishes information as to whether the Crown claims this part of the Bristol Channel as being within the territorial jurisdiction of His Majesty it can be given.”

and in answer to a question by the Court replied that the Secretary of State for Home Affairs instructed him to say that “ the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends.”

The Court of Appeal reversed the decision of Hill J. and held that this spot was not within the jurisdiction of the Court.

Bankes L.J. said that the question what bays, gulfs, or estuaries should be held to be within the territory of the state which owned the land on both sides had never been authoritatively answered, except in cases where some effective occupation had been proved or some statutory recognition established or where the opening is so narrow as to admit of no doubt. The dicta in *Cunningham's* case on which Hill J. had based his decision “ that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shore of which its several parts are respectively bounded ” must be considered as being directed to the facts of that case, where the collision occurred higher up the Bristol Channel where its width was not much over ten miles, in a spot within the port of Cardiff and between an island which is part of the parish of Cardiff and the Welsh shore, and only three miles from that shore, and these words were not applicable to other parts of the Bristol Channel where it was much wider and there was entire absence of effective occupation. If, therefore, the Court of Appeal had only had before them the same evidence as that before Hill J. he would still have hesitated to come to the same conclusion.

The statement of the Attorney-General, that the Crown did not claim that part of the Bristol Channel where the collision occurred as being within the territorial jurisdiction of the King, being given at the instance of the Court, did not lay the Court under the obligation to accept it, but it was information by which, having regard to the absence of authority and to the general trend of limiting the width of the bays to which the rule of territorial jurisdiction should apply, the Court should be guided.

Atkin L.J. based his decision on the ground that :

“ What is the territory of the Crown is a matter of which the Court takes judicial notice. The Court has, therefore, to inform itself from the best material available ; and on such a matter it may be its duty to obtain its information from the appropriate department of Government. Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive.”

In the absence of such a statement, if he had to decide the case upon the materials before Hill J., he would have come to the same conclusion as he did.

Lawrence L.J. agreed with *Bankes L.J.* in his interpretation of *Cunningham's* case, and in the conclusion to which he would have come if the case had come before the Court of Appeal on the same footing as it did before Hill J. He agreed also with *Atkin L.J.* that the Court was bound to accept the statement of the Attorney-General.

2. *The Bohemian Union Bank v. Administrator of Austrian Property.* 1927. 2 Ch. 175.

The plaintiff Bank, a joint stock company established since 1872 at Prague, claimed from the Administrator of Austrian Property the release of certain property which the

Administrator claimed the right to liquidate under Article 249 (b) of the Treaty of St. Germain and the Treaty of Peace (Austria) Order in Council.

It was admitted on behalf of the Administrator that the Bank, having its seat in Prague, had become a Czechoslovakian national in Czechoslovakian law and had ceased to be an Austrian national in Austrian law at the time of the coming into force of the Treaty of St. Germain.

The Bank contended (and the Administrator disputed the contention) that the Bank came within the terms of the proviso to Article 249 (b) under which "Persons who . . . acquired *ipso facto in accordance with the provisions of the treaty* the nationality of an Allied or Associated Power" are exempted from the operation of the retention and liquidation of property of nationals of the former Austrian Empire provided for in the first part of that paragraph.

Clausen J. held : (1) that Article 263 of the treaty, which referred to "individuals and juridical persons previously nationals of the former Austrian Empire" who "acquired *ipso facto* under the present treaty the nationality of an Allied or Associated Power" showed that companies as well as individuals might acquire nationality *ipso facto* under the treaty ; (2) that the plaintiff Bank acquired *ipso facto* Czechoslovakian nationality either under Article 70 of the Treaty, or, alternatively, under Article 53. Article 75 which refers expressly to "juridical persons" shows that Article 70 includes juridical persons as well as individuals, and a company which possessed civil rights at Prague was a "person which possessed rights of citizenship" in Czechoslovakia, a territory of the former Austro-Hungarian Monarchy, and became *ipso facto* a Czechoslovakian national under that article. The effect of Article 53 was automatically to make those persons, including juridical persons, who had been *de facto* Czechoslovakian nationals since 1918, Czechoslovakian nationals *de iure* ; (3) that the expression "acquired *ipso facto* in accordance with its (i.e. the treaty's) provisions the nationality of an Allied or Associated Power" in the proviso of Article 249 (b) means "acquired such nationality (without the execution of any act on their part) in conformity with the provisions of the treaty".

3. *Josef Inwald Actiengesellschaft v. Pfeiffer*. 43 T.L.R. 399 (C.A.)

This was an interlocutory appeal from an order of the Judge in Chambers. The plaintiff company was an Austrian national and claimed to recover a debt alleged to be due at the outbreak of war from the defendant, a Norwegian resident in England.

The plaintiffs admitted that the debt was the "property, right or interest" of an Austrian national in England and came under the charge created by Article 249 (b) and paragraph 4 of the Annex to Section IV of Part X of the Treaty of St. Germain, and that anything recovered would become the property of the Administrator of Austrian Property under the Treaty of Peace (Austria) Order, 1920, but argued that their right to sue was not taken away.

The defendants and the Administrator argued that Section 7, paragraph (x) (ee) of the Order, which provided that such debts should be "payable to the Administrator and the Administrator shall have power to enforce payment thereof and for that purpose shall have all such rights as if he were the creditor", transferred all the rights of the creditor, including the right to sue, to the Administrator, who had a discretion to decide whether he would sue or not, and that the plaintiff's claim must be struck out. The Master made an order striking out the claim and the Judge in Chambers affirmed the order of the Master.

In the Court of Appeal the Master of the Rolls held that the Judge in Chambers was right, but Scrutton L.J. dissented and, the Court of Appeal being equally divided, the order of the Judge in Chambers stood.

4. *The Jupiter*. No. 3, 1927. P. 122 and 250.

The ship in this case is the same as that which was the subject of the *Jupiter* No. 1, 1924, P. 236, and the *Jupiter* No. 2, 1925, P. 69, which were noted in the 1926 volume of the Year Book at pp. 219-20.

The *Jupiter* was in 1917 a steamship belonging to a Russian corporation called the "Ropit", whose head office was in Petrograd. The vessel was registered at Odessa and managed by an office of the company at that port. The vessel was at Odessa more or less continually from December 1917 till April 9, 1919. After that date she was never

again in a Russian port, but was engaged in voyages in different parts of the world till September, 1922, when she was laid up in an English port and was still laid up in October, 1924, when the writ in the present action was issued.

In 1917, when the Bolshevik revolution broke out in Russia, the Russian Soviet Federal Socialist Republic (R.S.F.S.R.) was established with jurisdiction over Petrograd and Moscow and certain other parts of Russia.

The Court found on the evidence that Odessa was never at any time under the jurisdiction of the R.S.F.S.R., or of any government acknowledging its authority; that at the end of 1917 and till March, 1918, there was no settled government at Odessa, and the R.S.F.S.R. and the Ukrainian Socialist (not Soviet) Republic both claimed jurisdiction over it, but in fact certain persons and bodies, calling themselves a Soviet, to some extent established themselves in Odessa in this period and at some date, probably before January 26, 1918, seized and purported to confiscate and nationalize (*inter alia*) the *Jupiter*, but though acting on Bolshevik principles they were acting rather as an independent sovereign authority than for either the R.S.F.S.R. or the Ukrainian Socialist Republic.

In March, 1918, the Austrian army occupied Odessa and put an end to their authority, and the *Jupiter* was returned to the persons in Odessa who formerly managed her. The Austrians were succeeded in October or November, 1918, by the French army, who, together with General Denikin, exercised authority in Odessa till some date in April, 1919 (after the *Jupiter* had gone), when the French troops left. The Ukrainian Socialist Soviet Republic then came into existence and established jurisdiction in Odessa, which it has since maintained (with the exception of an interval when General Denikin established authority there). The Ukrainian S.S.R. in July, 1923, united with the R.S.F.S.R. and other Soviet Republics in forming the U.S.S. Republics.

In 1920 a number of shareholders and officials of the Ropit company, having transferred themselves and a number of vessels of the company from Russia, began carrying on business in France under the name of the company or its French equivalent, the *C^{ie} Russe de Navigation à Vapeur et de Commerce*, and from a head office in Paris and a managing office in Marseilles managed these ships of the company, including the *Jupiter*. They did not recognize the authority of the Russian Soviet Government, nor did they act in communication with the head office of the company in Petrograd.

On August 30, 1920, Lepine, who had for a long time been in the employment of the Ropit Company and had been master of other ships of that Company, was appointed by the Paris or Marseilles office, master of the *Jupiter* and was paid by and received orders from the offices in France.

On September 3, 1920, when the *Jupiter* was in the port of Bordeaux, the Commercial Tribunal of Marseilles appointed Maître Pelen "provisional administrator" of the *Jupiter*. Similar decrees had been made appointing administrators of other ships of the Ropit Company in France. On August 12, 1921, Pelen and one Jaujon became joint administrators of this ship, and on April 10, 1923, were succeeded by M. Bourgeois who was appointed provisional administrator of all the property of the Ropit Company (including this vessel) situated outside Russia.

M. Tcheloff and M. Margoline were directors elected by the shareholders and masters of the Ropit vessels respectively in France for the assistance of the administrators in the management of the business in France. In 1922, trading having become unprofitable, the *Jupiter* was laid up in an English port where she remained in charge of the master, Lepine. In 1921, H.M. Government recognized the R.S.F.S.R. as the *de facto* and in February, 1924, the U.S.S.R. as the *de iure* Government of Russia.

In March, 1924, Lepine, the master who had up till that time acted under the orders of the offices in France and of the administrator, handed over the ship's papers to the representatives in England of the Government of the U.S.S.R. who took possession of the ship.

In April, 1924, a writ *in rem* was taken in the name of the *C^{ie} Russe, &c.*, claiming as sole owners of the vessel to have possession of the vessel decreed to them. The U.S.S.R., in whose possession the vessel then was, appealed, and, stating that the vessel was the property of the U.S.S.R., moved to set aside the writ on the ground that the U.S.S.R. was a sovereign state and, as it had not submitted to the jurisdiction, it could not be impleaded. This writ was set aside on this ground (*Jupiter* No. 1). In September, 1924, the Arcos S.S. Coy., Ltd., acting on behalf of the U.S.S.R., sold the

ship to the Cantiere Olivo Società Anonima, an Italian company, and handed over possession of the ship lying at Dartmouth to that company, and guaranteed the purchasers against claims by third parties to the vessel.

A second writ *in rem*, the writ in this action, was then taken out in the name of the plaintiffs, the C^{ie} Russe, &c., as a corporation under French law, claiming that they were owners of the ship and asking for a decree of possession. MM. Bourgeois, Tcheloff, and Margoline were, by subsequent amendments, added as plaintiffs. The Italian company appeared as defendants, but the action was really defended on their behalf by the U.S.S.R.

The defendants applied to set aside the writ on various grounds, including *inter alia* that, as the ship had been sold by the U.S.S.R. to them under a guarantee, to allow the action to proceed would be impleading a foreign sovereign state. The application was refused (*Jupiter* No. 2), and the action proceeded to trial before Hill J.

In the interval, in 1925, the U.S.S.R. took proceedings in the French Courts to obtain a cancellation of the decree appointing M. Bourgeois administrator of the property of the Ropit, and for the delivery of possession of such property to the U.S.S.R. This application was refused by the French courts.

At the trial before Hill J. the plaintiffs, the C^{ie} Russe, &c., claimed a decree of possession on the grounds

- (1) that they were the owners of the vessel;
- (2) that they had been in possession of the vessel and had been wrongfully deprived of possession by the action of her master in March, 1924.

The plaintiffs Bourgeois, Tcheloff, and Margoline claimed possession on ground No. 2.

The defendants contended *inter alia*:

(1) that the property in the vessel had passed to the R.S.F.S.R. under a decree of that Republic of January 26, 1918, under which it had become nationalized and made the property of the Republic;

(2) that a decree of the R.S.F.S.R. of March 4, 1919, had dissolved the Ropit Co., which had ceased to exist, and transferred its property to the R.S.F.S.R. wherever situated, or alternatively had provided for its dissolution and the transfer of its property upon dissolution, and that dissolution had taken place;

(3) that in fact the *Jupiter* had been seized in Odessa and nationalized under the decree of January, 1918;

(4) that the *Jupiter* had been seized by the Soviet of Odessa as an independent sovereign and become the property of that Soviet, and the Ukrainian S.S. Republic were the successors of that Soviet and the U.S.S.R. represented the Ukrainian S.S.R.;

(5) that the nationalization decrees took effect with regard to this vessel when the master delivered her in England in 1924 to the representatives of the U.S.S.R. as her rightful owners.

Hill J. held:

(1) that if the Ropit Co. had, under the decrees of the R.S.F.S.R., ceased to exist, it could not sue; if it had not ceased to exist it had given no authority for an action to be brought in its name; there was no company called the C^{ie} Russe, &c. formed under French law and, therefore, the name of the C^{ie} Russe, &c. must be struck out of the writ as a separate plaintiff;

(2) (Upon evidence of French law) that under the decree of the Commercial Tribunal of Marseilles of September 3, 1920, made when the *Jupiter* was in a French port, possession of the vessel had been vested in the administrator Pelen, and that under the French decree of April 10, 1923, such possession had passed to the plaintiff Bourgeois. The absence of the vessel from France at the time of the making of the decree of April 10, 1923, did not prevent the French courts from being able validly to substitute one French administrator for another; the possession of the plaintiff Bourgeois was exclusive and not jointly with the plaintiffs Tcheloff and Margoline;

(3) that Lepine, having been appointed master of the vessel by the offices of the so-called C^{ie} Russe in France and having accepted such appointment as a servant of the body of persons in France calling itself the C^{ie} Russe and its administrators appointed by the French courts, and having acted under the orders of such persons until March, 1924, did not himself at that date have any legal possession in the vessel. Such possession remained in M. Bourgeois up till the time of the master's handing her

over to the representatives of the U.S.S.R. in England, which was a breach of trust towards his employers and *prima facie* wrongful, and that the plaintiff Bourgeois having been thus wrongfully deprived of his possession in fact was *prima facie* entitled to recover possession unless the defendants could establish that the U.S.S.R. who sold the vessel to them had a title superior to the possessory title of M. Bourgeois, and that the onus of proof on this point was on the defendants;

(4) that the contention of the defendants, that the statement upon affidavit of the representative of the U.S.S.R., that the ship had been at the time of the sale the property of the U.S.S.R., must be accepted as conclusive, was wrong; the statements of foreign sovereigns on questions of law or fact are not conclusive, and a statement of a foreign sovereign, that anything is his property, has to be accepted only when to require that his title should be proved would involve a violation of the immunity of such sovereign from the exercise of jurisdiction over himself and his property, and no question of immunity arose in this case since the U.S.S.R. did not claim that the ship was now their property and were not, therefore, impleaded in this action;

(5) that therefore the defendants, if they were to succeed, must prove that the property in the vessel had passed to the U.S.S.R. and, in so far as they claimed that it had been transferred by foreign laws or sovereign acts, they must prove by evidence in the ordinary way that such laws or acts had this legal effect, and the circumstances were such that they must be recognized as applying to this vessel;

(6) that the decrees of the R.S.F.S.R. only provided for the liquidation of the company and for the transfer of the property in the course of or on completion of the liquidation of the company (cp. the findings of the H.L. in the cases of *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* and *Employers' Liability Assurance Co. v. Sedgwick* with regard to other decrees of the R.S.F.S.R. of a similar character), and that, assuming that the liquidation of this company was complete, a decree of the R.S.F.S.R. liquidating and transferring the property of a Russian company could not be recognized as applying to property of that company outside the territorial jurisdiction of the R.S.F.S.R., and, moreover, there was the evidence of circulars issued by departments of the R.S.F.S.R. that the Government of the R.S.F.S.R. did not regard the nationalization decrees of the R.S.F.S.R. as affecting the property of citizens of the R.S.F.S.R. situated outside the territory of the R.S.F.S.R.;

(7) that the *Jupiter* had never been within the jurisdiction of the R.S.F.S.R. and therefore had never been affected by its nationalization decrees;

(8) that, whatever legal effect the seizure in 1917 or 1918 by the Soviet of Odessa may have had, it was nullified and reversed by the retaking of the vessels after March, 1918, by the persons who had formerly controlled them and who continued to control them during the Austrian and French occupation of Odessa and eventually removed them to France;

(9) that if under the decrees of the R.S.F.S.R. the Ropit Company had been completely liquidated and ceased to exist, the property of the company outside the jurisdiction of the R.S.F.S.R. would become *bona vacantia* and the property of the first occupiers—who in the case of this ship were the persons who controlled the vessel when she left Russia and continued to control her from offices in France;

(10) that, therefore, the plaintiff Bourgeois having established a right of possession of the vessel and having been wrongfully deprived of that possession, and the defendants having failed to establish any superior title to the vessel, judgment for the delivery of possession to the plaintiff Bourgeois must be given.

On appeal to the Court of Appeal the L.JJ. unanimously confirmed the judgment of Hill J.

5. *Richardson v. Richardson. National Bank of India, Ltd. (Garnishees)*. 1927. P. 228.

Mrs. Richardson had obtained a divorce from her husband and a judgment against him for the payment of a sum of money for costs. As a judgment creditor she desired to enforce the judgment by execution and applied for a garnishee order under Order 45, Rule 1, of the Rules of the Supreme Court directed against the National Bank of India, Ltd., attaching certain balances which, she alleged, were standing to the credit of the judgment debtor both at the Head Office of the Bank in London and in branches in Kenya Colony and Tanganyika Territory in East Africa.

The registrar made an order limited to the balances at the Head Office in London,

but refused to extend it to the balances at the branches in East Africa. The judgment creditor appealed to the judge and asked for an extension of the order and the garnishees opposed such extension of the order.

It was held by Hill J. :

(1) that the general power of execution extends only to property within the jurisdiction of the Court which grants it, and the attachment of debts, being a form of execution, is confined to debts situated and property recoverable within the jurisdiction ;

(2) that Order 45, Rule 1, of the Rules of the Supreme Court, providing for the attachment of debts owed " by a person who is indebted to the judgment debtor and is within the jurisdiction ", must be construed as meaning owed " by a person who is indebted within the jurisdiction and is within the jurisdiction " ;

(3) that though the Bank and all its branches formed one legal person which was within the jurisdiction and though the Bank could be sued in England in respect of a debt due from a branch in East Africa, the balances (if any) to the credit of the judgment debtor at the branches in East Africa were not debts situated and properly recoverable within the jurisdiction, and could not be made the subject of orders of execution of the English courts.

(4) *Alternatively*, as it was not certain that, if an order of attachment were made against the Bank in respect of the balances in East Africa and the Bank were to pay such balances to the judgment creditor under the order, such payment would operate as a discharge in East Africa, it would be unjust to make such an order and the Court in its discretion would refuse to do so (cp. on this point *The Employers' Liability Assurance Corporation v. Sedgwick Collins & Co., Ltd.* 1927 A.C. 95, and *Year Book* of 1927, at p. 199).

(5) *Alternatively*, the balances in East Africa were sums due in a foreign currency (i. e. Kenya and Tanganyika shillings), and the failure to pay a sum due in a foreign currency creates in England a right of action for damages and not for a debt, and therefore it was doubtful if balances in a foreign currency could be attached as debts.

6. *London & South American Investment Trust v. British Tobacco Co. (Australia).* 1927. 1 Ch. 107.

The plaintiff company was a company incorporated in England, whose registered office and management were in England. It carried on business there as a trust investment company. It held certain shares in (a) a company called the Australian Pastoral Company ; (b) the defendant company.

The defendant company was also incorporated in England with its registered office in England, but had its head office and directors in Australia. It had two registers of shareholders, one in England and one in Australia, and its dividends were declared in Australia. The plaintiff company's shares were on the English register and only transferable there. The defendant company's business consisted in the holding of shares in other companies and its holdings consisted of shares in four companies carrying on business in Australia.

The Australian Revenue authorities, acting under the provisions of the Australian Income Tax Assessment Act, 1915-21, made an assessment of the sum of £67 18s. 0d. on the plaintiff company as being the amount due by the plaintiff company to the Australian Government for income tax on the dividends due to the plaintiff company from its shares in (1) the Australian Pastoral Company ; (2) the defendant company, as being income derived during the year from sources in Australia. The Australian Act provided that in certain circumstances where a person (or company) was liable to income tax and, by reason of his absence from Australia, it was difficult to collect the tax from such person direct and there was some other person in Australia owing money or making payments to such person, the income tax authorities could, by serving notice on the person within the jurisdiction, require him to deduct from the money in his hands due to the person outside the jurisdiction, the amount owing by the latter by way of income tax, and to pay it to the income tax authorities. The defendant company, having received such notice in respect of the £67 18s. to which the plaintiff company had been assessed as above stated, deducted this sum from dividends payable to the plaintiff company on their shares in the defendant company. The plaintiff company now sued to recover this sum from the defendant company.

The plaintiff company contended :

(1) that the contract governing the relations, as a shareholder, of the plaintiff company, a company incorporated, domiciled, resident, and carrying on business exclusively in England, with the defendant company, an English company with its registered office in England, was an English contract and the dividends payable by the defendant company to the plaintiff company constituted a debt properly recoverable and locally situated in England ;

(2) that therefore it was no answer to the claim of the plaintiff company to receive their dividends that the defendant company had been compelled to make certain payments to the Australian Government.

The defendant company argued :

(1) that as the head office of the defendant company was in Australia the defendant company was resident in Australia, and the dividends, being a debt due by a company resident in Australia, were locally situated there ; and

(2) that such dividends, having under the law of the country where they were situated become attached and made liable in the hands of the defendant company to satisfy a debt of the plaintiff company in that country, the payment of such debt by the defendant company was a good discharge.

Held by Tomlin J. :

(1) that the defendant company, being an English company with a registered office in England, and the shares of the plaintiff company being transferable only on the English register, it was clear, on the authority of previous cases, that the shares of the plaintiff company in the defendant company must be held to be situated in England ;

(2) that the dividends on such shares could not be held to be situated elsewhere than where the shares were situate, and were a debt situate in England arising out of an English contract ;

(3) that the payment of a debt situated in England and arising out of an English contract could not be affected by any legislation or anything done under the legislation of Australia ;

(4) that the defendant company were not discharged from their liability to the plaintiff company in respect of the sum of £67 18s., part of the dividends due to the plaintiff company, by the payments of this sum to the Australian income tax authorities.

Note

An important point which was considered in this case related to the power of the Australian legislature under its constitution to make the assessment in question on the plaintiff company, and it was argued for the plaintiff company that the provisions of the Australian Income Tax Assessment Act, in so far as they purported to authorize such taxation, were *ultra vires*. The learned judge held :

(1) that the assessment in respect of the shares in the defendant company was *ultra vires* the legislative power of the Commonwealth on the ground that under its constitution the Commonwealth had no power to tax persons not resident or domiciled in Australia in respect of property situated outside Australia, and the plaintiff company was not domiciled or resident in Australia, and the dividends due from the defendant company were, for the reasons stated above, a debt locally situate in England and were therefore property situated outside Australia ;

(2) in the absence of evidence as to the Australian Pastoral Company he assumed that the assessment was valid. This point, however, is one of constitutional law only and the judgment upon it does not turn on any principle of international law.

7. *Salvesen or Von Lorang v. Administrator of Austrian Property*. 1927. A.C. 641.

The Administrator of Austrian Property claimed in proceedings in the Scottish courts certain movable property situated in Scotland belonging to the appellant on the ground that she was an Austrian national by virtue of her marriage in 1897 in Paris with Herr von Lorang, an Austrian subject, and that her property was charged under Treaty of Peace (Austria) Orders of 1920 and 1921, and Article 249 (b) of the Treaty of St. Germain. The appellant claimed that her property was not subject to the charge on the ground that the alleged marriage in Paris was invalid for the reason that the formalities of residence and publication which French law required had not been observed, and

a certificate had been presented to the registrar to the effect that von Lorang was domiciled in France, and no publication of banns in Austria was required by Austrian law, which was false; and that, therefore, she was not and had never been an Austrian national. She declared her intention of bringing a suit for nullity in the Civil Court of Wiesbaden where she and Herr von Lorang were domiciled, and the proceedings were stayed to give her time to do so. She then brought a nullity suit and (the Administrator not intervening) obtained a decree of nullity on the ground that the formalities required by French law had not been fulfilled and that, as regards formalities, the rule *locus regit actum* applied.

It was then argued on behalf of the appellant in the Scottish Court of Session that the decree of nullity was the judgment (1) of a court of competent jurisdiction, (2) in a matter of status and was, therefore, like a decree of divorce, in the nature of a judgment *in rem* and as such must be accepted in the courts of every country.

On behalf of the Administrator the competence of the German court was not disputed, but it was argued that a foreign decree of nullity was not a decree in a matter of status nor in the nature of a judgment *in rem* and was not binding on the Scottish courts, and leave was sought to lead evidence to prove that the marriage was valid and, so far as the judgment was concerned, that it was obtained by collusion and proceeded on a mistaken view of French law.

The Lord Ordinary held that the decree must be accepted and refused to allow the respondent to produce evidence on these points. On appeal to the First Division, the decision of the Lord Ordinary was reversed by a majority and the case remitted to allow evidence to be given. The appellant appealed to the House of Lords and the House (Lords Haldane, Dunedin, Phillimore, Blanesburgh, and Warrington of Clyffe) unanimously reversed the decision of the First Division and restored the judgment of the Lord Ordinary.

It was held by the House of Lords (1) that the appellant and Herr von Lorang being both domiciled in Germany, the German court was a court of competent jurisdiction to pronounce upon the validity of the marriage.

The case of *Sinclair v. Sinclair*, 2 Hag. Cons. 395 was distinguished on the facts on the grounds (1) that the Belgian court whose decree of nullity was there relied on was not a court of the domicile; (2) that there were two marriage ceremonies in that case, in France and in England, and the Belgian court had only pronounced on the French ceremony (per Lord Phillimore). The dicta of Sir Wm. Scott in that case to the effect that the English court would not consider itself concluded by any previous decision of any other court, even when rendered between the same parties, but would look at such decisions merely as helps or guides or adminicula of proof, to which, when the decision was that of a court of the country where the marriage took place, the court would pay great attention, could not be regarded as applying to the decision of a court of the domicile.

The case of *Simonin v. Mallac*, 2 Sw. and Tr. 67 was distinguished (per Lord Phillimore) on the ground that the petitioner in that case did not claim that the French decree was conclusive, but relied on it only as evidence of French law.

The case of *Ogden v. Ogden*, 1908, P. 46 (per Lord Dunedin and Lord Phillimore) was, possibly, distinguishable on the ground that the respondent in that case to the nullity proceedings, who relied on the decree of nullity pronounced in the French courts, had never proceeded to France, and was not in a position to allege that she had become domiciled in France by virtue of a marriage, whose validity she contested, to a domiciled Frenchman (see 1908, P., at p. 78). Further (per Lord Phillimore), that case having been unfavourably commented upon in the judgment of the Privy Council in the *Attorney-General for Alberta v. Cook*, 1926, A.C. 444 could not, whether it was a right or wrong decision on the facts of that case, be regarded as an authority that English law would not recognize as final a decree of nullity pronounced by the court of the country where the parties were domiciled.

The decision of the majority of the Court of Appeal in *Niboyet v. Niboyet*, 4 P.D. 1 is no longer law. Dicta of Brett L.J. dissenting that domicile is not a ground of jurisdiction in nullity suits overruled.

(2) A decree of nullity of marriage is a judgment in a matter of status, and like a judgment *in rem*, if it is the decree of a court of competent jurisdiction, must be recognized everywhere unless it is obtained by fraud or is contrary to natural justice.

(Per Lord Haldane) It is a judgment relating to status because the parties to an

invalid marriage are regarded in law as married persons subject to all the rights and obligations attaching to that status "until the decree of a competent court is obtained under which they cease retrospectively to have been married people".

(*Per Lord Haldane and Lord Dunedin*) Dicta in *Ogden v. Ogden*, 1908, P., at p. 80, and the decision of the Lord President in Court of Session in this case, drawing a distinction between decrees of nullity based on impotence (on the ground that impotence is not a bar to the constitution of a marriage, but a resolute condition of the contract invalidating a marriage that was complete), and decrees based on other grounds overruled.

(3) That there was no fraud in this case. It was immaterial that the motive of the appellant in petitioning for this decree was to secure her property in Scotland from being seized under the Treaty of Peace Order, since no fraud or deception of the tribunal had taken place.

8. *Republic of Guatemala v. Nunez*. 1927. 1 K.B. 699. C.A.¹

In 1898 one Cabrera became President of Guatemala. In 1906 he caused to be paid to his credit with Lazard Brothers, bankers in London, the sum of £21,800, which was the subject of this action. In April, 1920, he was deposed from the office of President and was kept a prisoner in Guatemala by his political rivals until his death in prison in 1924. The Republic, the plaintiffs, claimed the money from Lazard Brothers on the ground that the money was part of the public funds of the Republic, which Cabrera had attempted to misappropriate. In support of this contention a communication was relied on, dated July 12, 1921, signed by Cabrera and addressed to Lazard Brothers, ordering them to transfer this sum to the credit of the Republic as being the "public funds of the nation". This communication was conveyed to Lazard Brothers on August 10, 1921, by the Guatemalan consul in London. It was confirmed by a subsequent communication signed by Cabrera which was produced by the consul on October 11.

Lazard Brothers, having received claims to the money on behalf of the defendant, obtained leave to interplead and, on the money being deposited in court, were released from the action. The defendant Nunez was made defendant in the action. He was an illegitimate son of the ex-President and claimed that the money had been given to him, and he relied upon a letter, signed by Cabrera, dated July 24, 1919, and addressed to Lazard Brothers, transferring the money to him, as an assignment of the debt owing by Lazard Brothers to Cabrera. Notice of this letter was received by Lazard Brothers on August 4, 1921.

The action being thus constituted by interpleader proceedings, in which both parties claimed a sum which had been held by Lazard Brothers for Cabrera as his private property and was now in court, the onus rested equally on both the plaintiffs and the defendant affirmatively to prove a right to the sum.

Greer J. dismissed the claims of both the plaintiffs and the defendant with costs, and the money was ordered to remain in court pending further proceedings.

In opposition to the plaintiff's claim, the defendant contended with regard to both communications on which the plaintiffs relied (1) that they were not admissible as evidence at all; (2) that Cabrera had been compelled to sign them under duress and in fear of his life. The learned judge held that both the document of July 12, 1921, and that of October 10, 1921, were admissible as evidence, on the ground that they were statements of Cabrera against his proprietary interest, and in this matter Cabrera was in the position of the defendant's predecessor in title. Nevertheless, though they were admissible, he could not attach any weight to them, since all their value as admissions was taken away by the circumstances in which they were made—when Cabrera was sick and a prisoner in the hands of his political opponents, and in the presence only of a member of the rival government, his gaoler, and a notary. He held that the plaintiffs had failed to prove that the moneys standing to the credit of Cabrera at Lazard Brothers were public funds.

In opposition to the defendant's claim, the plaintiffs contended (1) that the letter of July 24, 1919, was not a genuine document at all, and did not come into existence till a much later date; (2) that in any event it was void as an assignment, since it did not

¹ The report of this case before Greer J. was noted in the *Year Book* for 1927, at p. 196. For convenience, however, the statement of facts and decision of Greer J. are reprinted here.

fulfil the requirements of Guatemalan law with regard to donations, which require all contracts or promises to transfer any kind of property (over \$100 in value) to be made by deed before a notary public and on stamped paper ; (3) that the defendant was an infant at the time of the alleged assignment, and by Guatemalan law an infant is incapable of accepting any donation unless such donation is made to and accepted by a legal representative appointed by a judge on the infant's behalf, and no legal representative had been so appointed and the assignment was therefore void because the defendant was incapable of accepting it by Guatemalan law, which governed his capacity in this case, because (1) he was domiciled there, or alternatively because (2) the assignment took place there.

Greer J. held :

(1) that the letter was a genuine document which had been signed by Cabrera before July 21, 1921, though possibly not on the date which it bore ;

(2) that the letter was a good assignment in English law, but was void by Guatemalan law ;

(3) that Rule 153 of Dicey's *Conflict of Laws*, which states that an assignment of a debt giving a good title thereto according to the *lex situs* of the debt is valid, is too widely stated, is not supported by any authority, and is contrary to *Lee v. Abdy* (17 Q.B.D. 309) ;

(4) that it would be inconsistent with international comity to hold that a transfer made in a foreign country between two citizens of that country domiciled there should be valid as between the transferor and transferee merely because it was in accordance with law.

Both the plaintiffs and the defendant appealed.

The Court of Appeal unanimously dismissed the appeal of the plaintiffs, which raised mainly questions of fact, on grounds similar to those adopted by Greer J.

The L.J.J. were also unanimous in holding that the defendant had established no claim to the money, but the grounds on which their respective decisions were based differed somewhat from each other and from those adopted by Greer J.

Banks L.J. accepted the contention of the defendant that the weight of authority indicated that a debt had a *situs*, but held that questions relating to the ownership of a fund situated in England arising between persons domiciled in Guatemala and out of transactions taking place in Guatemala, must be decided by the law of Guatemala, and that, as the defendant's claim was bad by the law of Guatemala, it could not be established. He thought that on principle and authority the judgment of Greer J. was right. He reserved the question whether there were any circumstances in which Rule 153 in Dicey's *Conflict of Laws* could apply.

Scrutton L.J. held : (1) on a review of the authorities that the capacity of parties to enter into a transaction was governed either by the *lex domicilii* or by the *lex loci contractus*, that where these two laws were the same, as in the present case, it was unnecessary to decide which of them governed the case ; that therefore the defendant, being incapable by Guatemalan law, which was the law of his domicile, and by the law where the transaction took place, of receiving this voluntary assignment, the transaction was void on the ground of incapacity ; (2) that where, through the omission of formalities, a transaction is, by the law of the place where it is made, rendered void (as opposed to unenforceable or inadmissible in evidence), it is a nullity by the law of England ; that therefore the assignment to the defendant, being made in Guatemala and being void by Guatemalan law, was void in England ; (3) with reference to Dicey's Rule 153 that there was no authority in support of the view that the assignment of a debt, which was good by the law of the country where the debt was situated, was valid if the assignment was invalid both by the law of the country where the assignment took place and by the law of the domicile of the parties. The L.J. pointed out, after a review of the authorities, that it appeared that the judgments where the *lex situs* had been relied upon were all cases in which the *lex situs* and the *lex loci contractus* were the same.

Lawrence L.J. held : (1) that a debt can be said to have a local situation, and this debt from Lazard Brothers to Cabrera was situated in England ; (2) that the rule that a transfer of goods made according to the *lex situs* is valid is well established, and once it was established that a debt had a local situation the same principle should apply to its transfer as to a transfer of goods, and an assignment of a debt situated in England

and good by English law was valid although not valid from the point of view of form by the law of the country where the assignment was made and where the parties were domiciled. This rule did not, however, apply to universal or general assignments or testamentary dispositions. Nor did it apply to contracts to assign as opposed to assignments, and on this ground the L.J. distinguished the authorities relied upon by Scrutton L.J. in (2) of his judgment above; (3) that a person's capacity to assign and to accept an assignment of property is governed either by the law of his domicile or by the law of the country where the transaction takes place and where they are the same law it is not necessary to decide which principle applies; (4) that the provisions of the law of Guatemala with reference to the acceptance by infants of donations were matters of substance and not of form and rendered an infant incapable of himself accepting them; (5) that there was no authority for the view that a transfer of property situated in one country and valid by the local law of that country made by or to a person incapable of making or receiving such a transfer by the law of the country where he was domiciled and by the law of the place where the transaction took place, was valid in English law, and in so far as Dicey's Rule 153 purported to express this view, it was too widely stated. The cases of *Worms v. De Valdor* and *In re Selot's Trusts*, if correctly decided, were distinguishable on the ground that the courts cannot recognize any incapacity unknown to English law; (6) that the assignment to the defendant, though valid from the point of view of form, being made in form valid by the *lex loci situs*, was invalid because the defendant was incapable of receiving it by Guatemalan law, which was the *lex loci actus* and the *lex domicilii*.

9. *In the Estate of Abdul Majid Belshah, deceased.*

The Times Newspaper 16 and 18 December, 1926; 14 and 18 January, 1927.

(In the report in *The Times*, the deceased is described as being domiciled in England. It has been ascertained that this is an error and that the deceased was admitted on the pleadings to be domiciled in Bagdad.)

The deceased, Abdul Majid Belshah, was a person of Mohammedan religion domiciled in Bagdad. According to the law of his domicile (i.e. Mohammedan law) he was capable of marrying more than one wife. For some fifteen or more years before his death he had been resident in England and engaged as a teacher of Eastern languages. In 1905 in England he went through a ceremony of marriage according to Mohammedan law with an English woman, described in the proceedings as Violet Annie Majid, and by her he had two children. Later, in 1920 (or alternatively in 1922), he went through a ceremony of marriage in England according to Mohammedan law with another English woman, described in the action as Kate Elizabeth Belshah, by whom he had also two children. In 1923 he died intestate. Claims to his estate were made in the Probate Division of the High Court by these two women and their respective children, in which each of them denied the right of the other to succeed to any of the estate. However, during the hearing the two parties came to an agreement, and the proceedings were terminated on the terms of an agreed settlement, which was made an Order of the Court. Under this settlement both parties recognize the validity of both the marriages according to Mohammedan law and the legitimacy of the four children, and the solicitors to the two parties were appointed administrators *ad colligenda bona*.

10. *F. Koechlin et Cie v. Kestenbaum Bros.* 1927. 1 K.B. 616 and 889.

The plaintiffs, as holders of a bill of exchange in francs, sued the defendants, as acceptors, for the sterling equivalent of the amount of the bill. The bill was drawn on December 14, 1925, in France in the name of E.V. upon the defendants in London to the order of M.V.

E.V. was the son of M.V. and had authority from M.V. to draw and endorse bills in his own name for the account of M.V., and this bill was signed in blank by E.V. in his own name. On December 15, 1925, it was endorsed by E.V. in his own name to the plaintiffs, and discounted with them. Both in drawing and endorsing the bill in his own name E.V. was acting under his authority for the account of M.V. The bill was then sent to the defendants in London who accepted it payable at a bank in London; it was returned by them to M.V. in Paris, who delivered it to the plaintiffs, and the plaintiffs then endorsed it to the order of the Bank of France on December 30, and the Bank of France endorsed it to the order of Lazard Bros., bankers in London. It was

then presented for payment by Lazard Bros. on behalf of the plaintiffs and payment was refused and the plaintiffs brought the present action.

The defendants contended that the plaintiffs were not holders of the bill and could not sue upon it. A holder of a bill is defined in Section 2 of the Bills of Exchange Act, 1882, as "payee or indorsee of a bill or note who is in possession of it or the bearer thereof". The plaintiffs, though in possession of the bill, were not payees or bearers and were not endorsees, because the bill had not been negotiated. Section 31 (3) of the Act provides that a bill payable to order is negotiated by the endorsement of the holder completed by delivery, and this bill was payable to the order of M.V. and had not been endorsed by M.V. It was true that under Section 91 an endorsement by M.V. need not be made by his own hand, but may be made by some person on his behalf and by his authority, but his signature must be on the bill.

The plaintiffs were parties to whom the bill had been transferred by the holder, M.V., without endorsement, and their position was governed by Section 34 (4) of the Act. They had the right as against M.V. in France to obtain his endorsement, but could not sue on the bill until it was obtained.

Section 72 of the Act provides :

"Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows :

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the super-vening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.
- (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made."

The obligations of the defendants who accepted the bill in England were, under Section 72 (2), governed by English law, and they are only liable to pay upon an endorsement which is in accordance with their contract of acceptance, i.e. an endorsement valid by English law. Under Section 72 the contract of endorsement made may be governed by French law, but that is a matter as between endorser and endorsee.

The plaintiffs argued :

(1) that the question whether the endorsement of E.V. was a valid endorsement was a matter of form, and having been made in France its validity was governed, under Section 71 (1) of the Act, by French law. They produced evidence of a French advocate to the effect that if an agent was duly authorized by his principal to sign on behalf of his principal, a signature or endorsement by the agent in his own name was a valid signature or endorsement according to French law, and that it was not necessary to add the words "per pro." and contended that the endorsement by E.V. was therefore a valid endorsement by French law and entitled the plaintiffs to sue as holders.

They relied on *Trimbey v. Vignier* and *Bradlaugh v. De Rin* where an acceptor in England of a bill endorsed in France, in a form valid by English but invalid by French law, had been held not liable ;

(2) that the rule that the validity of a transfer of chattels is governed by the law of the country where the transfer takes place applies to bills of exchange and to transfers of bills by endorsement. They relied upon *Embiricos v. Anglo-Austrian Bank*. The transfer of the bill being valid by the law of France where it took place was valid everywhere.

Rowlatt J. accepted the evidence of the French law tendered by the plaintiffs, but held that the plaintiffs were not entitled to recover from the defendants whose obligations as acceptors were governed by English law, and that under Sections 31 (3) and 32 (1) of the Act they were only liable to pay the holder of a bill payable to order if it bore the signature of the payee, and this bill did not bear such signature. In the case of an endorsement made abroad, Section 72 (1) of the Act required that the endorsement should conform to the law of the country where it was made, and it was necessary that it should be good by that law also, but that did not dispense with the necessity, in order to charge an acceptor in England, of an endorsement made in accordance with English law.

The Court of Appeal reversed this decision on the grounds (1) that Section 72 (1) of the Act had provided that the rights and liabilities of parties to the bill (including

those of the acceptor), were determined as regards the requisites of form for an endorsement on the basis that they should be governed by the law of the place where the endorsement was made, and that this was the English law by which the obligations of an acceptor in England were governed.

(2) that the question whether a bill payable to the order of M.V. could be endorsed by E.V. in his own name only, if he had authority to do so, was a question of form ;

(3) that the form being good by French law, where the endorsement was made, it was a valid endorsement ; or alternatively

(4) that if it was not a question of form it was a question of the validity of a transfer of a bill of exchange by endorsement, and under Section 72 (2) of the Act, as interpreted by *Embiricos v. Anglo-Austrian Bank*, that question was governed as in the case of the transfer of other chattels, by the law of the country where the transfer took place.

11. *Société Anonyme des Grands Établissements du Touquet Paris-Plage v. Baumgart.*
43 T.L.R. 278.

The plaintiffs claimed to recover from the defendant the sum of £400, the amount of three dishonoured cheques drawn by the defendant and given to the plaintiffs. The plaintiffs sued (1) on the cheques, or alternatively (2) for £400 money lent.

The defendant had cashed the cheques with the plaintiffs' manager at the Casino at Le Touquet in France, and received £400.

The defendant alleged that the £400, the consideration for the cheques, was money advanced for the purposes of gaming and argued (i) that the cheques must, under the Gaming Act, 1835, be deemed to be given for an illegal consideration, and (ii) that money lent for the purposes of gaming in the Casino was not recoverable, and (iii) that the plaintiffs, having taken a security for which the consideration was made illegal by the statute, could not discard the cheque and hark back to the consideration and sue upon the loan. On the last point the defendant sought to distinguish the case of *Robinson v. Bland*, 1 Wm.B. 234, where it was held that there was no objection to falling back on the consideration, on the ground that it was a case decided before the Act of 1835, which declared that the consideration was deemed to be illegal and when the Act of Anne 1710 only made the security void.

The plaintiffs (i) alleged that the cheques were cashed for the general purposes of the defendant, not specially for gaming, and therefore did not come within the Act of 1836, and (ii) produced the evidence of a French advocate to prove that the games played at the Casino were lawful in France and that under French law the money could be recovered either on the cheques or as a loan for the purposes of gaming. The plaintiffs relied on *Quarrier v. Coulston*, 1 Ph. 147. Shearman J. found on the facts :

(1) that the money was required, to the knowledge of the plaintiff's manager, for the purposes of gaming ;

(2) that the games played, though illegal if played in England, were lawful in France, and the money was recoverable in that country.

He held :

(1) Following *Moulis v. Owen* 1907, 1 K.B. 746, that payment on the cheques could not be enforced in England by the plaintiffs by reason of the Act of 1835 ;

(2) that the plaintiffs, although they had taken a cheque, could sue on the consideration for a loan ;

(3) that there was nothing in English law to prevent the recovery of a loan made for the purposes of playing games in a foreign country where such games were lawful.

12. *Norske Atlas Insurance Co., Ltd. v. London General Insurance Co., Ltd.*
43 T.L.R. 541.

The plaintiff company, a Norwegian Insurance Company, entered into a contract of re-insurance in 1919 with the defendant company, an insurance company in London, relating to marine insurances, which was signed by the plaintiffs in Norway and the defendants in London. The contract contained an arbitration clause under which the parties undertook, if disputes under the contract should arise, not to resort to any court of law, but to refer the matter to certain arbitrators in Norway who were to meet and decide the matter in Oslo. The contract was not stamped, nor embodied in a policy, in accordance with the English law as to contracts of marine insurance.

Disputes arose and the plaintiff company claimed arbitration, but the defendant

company refused to arbitrate and the plaintiff company proceeded to obtain the appointment of arbitrators in the manner provided in the contract. In 1926 an award was made in Norway under which a sum of £4,675 was declared to be due from the defendants to the plaintiffs, and in the same year the plaintiffs began proceedings in the English courts claiming the said sum as being due upon the award.

The defendants admitted the award, but contended that the plaintiffs were not entitled to recover anything under it on the grounds that :

(1) the contract was one of marine insurance not embodied in a policy as required by Sections 22 and 23 of the Marine Insurance Act of 1906, and was void ;

(2) it was not properly stamped, as required by section 93 of the Stamp Act, 1891, and therefore under section 97 of that Act was unenforceable and was inadmissible in evidence ;

(3) the plaintiffs could not evade the fact that the contract was one of marine insurance and void and unenforceable by suing on the award for the award was inseparable from the original contract ;

(4) the defendants being a company residing in London and the award being only enforceable against them in England, the law applicable to the whole contract must be English law.

The plaintiffs gave evidence that the contract and the award were valid by the law of Norway, and contended that the law which governed the contract was that which the parties must be held to have intended, and that was shown by the arbitration provisions to be the law of Norway, and that if it is doubtful the construction which would uphold the validity of the transaction must be preferred.

Held by Mackinnon J. :

(1) that a person suing on an arbitration award had only to prove :

(a) the submission to arbitration ;

(b) the conduct of the arbitration according to the submission ;

(c) the fact that the award was valid according to the law of the country where it was made.

(2) that the contract, though inadmissible in the English courts as evidence of a contract of insurance, owing to its being neither in a form nor stamped in accordance with the requirements of the Marine Insurance Act or the Stamp Act, was admissible as evidence of the submission to arbitration ; that the law which governed the contract was that which the parties must be presumed to have intended, and though no guidance in this case was given by the place of signature, the inference must be drawn that it was intended to be governed by Norwegian law from the provision that arbitration should take place in Norway ; that on the evidence the contract was valid by Norwegian law ; and that on the above grounds a submission valid by the proper law of the contract was proved ;

(3) the proper conduct of the arbitration was not disputed ;

(4) on the evidence the award was valid by the law of Norway where it was given, and the plaintiffs had satisfied all the conditions necessary to entitle them to judgment on the award.

13. *Tallack v. Tallack.* 43 T.L.R. 467.

The petitioner, a British subject, had married the respondent, whose domicile of origin was Dutch, in 1912. There were two children of the marriage. The petitioner being then domiciled in England obtained a decree of divorce in the English courts in 1925 on the ground of the wife's adultery with the co-respondent, a Dutch subject domiciled in Holland. The respondent then married the co-respondent and became domiciled in Holland.

The petitioner sought to obtain an order from the English courts directing the respondent to make a settlement out of her private property for the children of the marriage under the power given to the Court by Section 191 (1) of the Judicature Act, 1925, to order a settlement to be made by a wife for the benefit of her children out of her property when a marriage has been dissolved by reason of her adultery.

The respondent appeared and disputed the jurisdiction of the Court to make such an order in this case on the grounds (1) that the wife was domiciled in Holland ; (2) that her property was situated in Holland out of the jurisdiction of the English courts ; (3) that the judgment of the English courts ordering a settlement would not be recognized in the

Dutch courts. Evidence of Dutch law on this point was given on behalf of the respondent, and also to the effect that the Dutch courts had no power to make orders for settlements of the kind asked for in this case.

Held by Lord Merrivale, P. :

(1) that the appearance of the respondent under protest against the jurisdiction could not be regarded as a submission to the jurisdiction;

(2) that as the Judicature Act, 1925, contained no express provisions defining the cases in which the jurisdiction to order a settlement could be exercised, the jurisdiction thereunder should be exercised in accordance with the principles of Private International Law;

(3) that as the respondent was domiciled in Holland and all her property was there, and a judgment of the English courts ordering her to make a settlement could not be enforced in the Dutch courts, such a judgment would either be ineffective and therefore contrary to the general principle that the courts of a country have only jurisdiction in those cases where they can give an effective judgment (as stated in Dicey, *Conflict of Laws*, 4th edition, at p. 37, General Principle No. III), or could only be enforced in Holland by an interference with the authority of a foreign state within the limits of its territory, which is also contrary to general principles (as stated in Dicey, i.e. at p. 27, General Principle No. II).

14. *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.* 1927. A.C. 604.

The plaintiffs (respondents in the House of Lords) were a Scotch firm who had a branch house in Bombay. The defendants (appellants) were merchants of Hong Kong. Under three contracts made through brokers in Java the plaintiffs agreed to buy from the defendants certain parcels of sugar to be shipped in the case of all the three contracts in three monthly instalments, c.i.f., from Java to Bombay, payment to be made at Hong Kong on presentation of the documents.

The plaintiffs received the goods and paid the money, but alleged that the last instalment under each contract had not been shipped in the month provided for in the contract, and claimed damages. All three contracts contained the following clause :

"Any dispute arising out of this contract is to be settled by arbitration of London brokers in the usual manner and this submission may be made a rule of Court."

The parties proceeded to arbitration in respect of two of the contracts only, but the defendants got the awards set aside in the K.B.D. The defendants then agreed to accept service of a writ and allow the matter to be tried in the English courts. The plaintiffs then applied to add a claim on the third contract, but the defendants resisted the application. In the circumstances all parties admitted that the question whether the new claim could be added depended on whether the court could have given leave to serve a writ out of the jurisdiction on the defendants in respect of this claim.

It was held by Mackinnon J., and the C.A. confirmed his decision, that the court could have given leave under Order XI, Rule I (e) (iii), "action is brought . . . to recover damages . . . in respect of a breach of a contract . . . by its terms or implication to be governed by English law."

The House of Lords held that the parties, having submitted their possible disputes under this contract to an English forum (i.e. a tribunal of arbitrators in London with a special stipulation that the award was to be enforceable by the English courts), had implicitly consented that the law which was to regulate the decision was the law of that forum.

"That did not mean that everything that would have to be decided would necessarily be decided by English law. It means that the underlying law was the law of England, but if by appropriate, that is to say relevant, averment, it was alleged that any incident of the contract fell to be determined by foreign law, then the English tribunal would proceed to inquire into that law as a question of fact and give judgment accordingly."

15. *Sabatier v. The Trading Company.* 1927. 1 Ch. 495.

The defendant company was incorporated in 1890 under the laws of the Russian Empire for the purpose of trading in tea and sugar, and had set up a branch in London which, from 1919, had been managed by A. In 1920 the name of A. was filed with the Registrar of Companies under the provisions of Section 274 of the Companies Act, 1908

as a person resident in the United Kingdom, authorized to accept service of process on behalf of the company. In 1921 the company decided to close its branch in London and in 1923 the Registrar of Companies, having come to the conclusion that the company had ceased to carry on business in the United Kingdom, marked the file of the company at the Registry as closed, but A. continued to carry on, from the former office of the company in London, certain administrative functions on behalf of the company (e.g. the remittance of dividends to shareholders), and was so acting up to the date of the commencement of this action. The plaintiff, who claimed that he had an interest in the assignment of certain shares in the defendant company, served in 1926 a writ against the company upon A.

The defendant company entered a conditional appearance and applied to set aside the service of the writ on the ground (1) that A. was not in 1926 a person on whom process might be served on behalf of the company under Section 274 of the Companies Act; (2) that the company had not in 1926 a place of business in England.

The plaintiff contended (1) that the defendant company had a place of business in London, on the ground that A. was carrying on the activities above mentioned at an office of the company in London; (2) that the name of A. having been filed under Section 274 of the Act as a person upon whom process might be served, service on him was a valid service although the company had ceased to carry on business in England. The plaintiff relied on this point on the judgment of the majority of the House of Lords in *Employers' Liability Corporation v. Sedgwick Collins & Co., Ltd.*, 1927 A.C. 95 (see the *Year Book* for 1927, at p. 199), where service on such a person was held to be a good service on a company which had ceased to carry on business in England, although such person had endeavoured to get his name removed from the file.

Clauson J. held:

(1) that the defendant company had a place of business in England, and process against the company could be served upon an officer of the company in England under Order IX, Rule 8, of the Rules of the Supreme Court, as an alternative to the right of service (if any) existing in this case under Article 274 of the Companies Act. He did not, however, decide whether service on A. would satisfy the provisions of that rule in this case as the plaintiff had not attempted to serve the company under that rule;

(2) on the construction of Section 274 that, if a foreign company has once established a place of business in this country, it remains its duty under that section, even if it ceases to carry on business at a place of business so established, to keep upon the register the name of a person in the United Kingdom authorized to accept service on its behalf, and that failure to do so involves liability to a fine, and that service on such a person is a good service although the company has no longer a place of business in this country. On this point he followed the view of the majority of the House of Lords in the case of the *Employers' Liability Corporation v. Sedgwick Collins & Co., Ltd.*

DE FACTO GOVERNMENT AND STATE SUCCESSION

DECISION OF NEW YORK SUPREME COURT.

In the case of the Irish Free State against the Guaranty Safe Deposit Company *et al.*, decided by the Supreme Court of New York in May, 1927, an action in equity was brought by the plaintiffs to obtain title to and possession of nearly \$3,000,000 held on deposit by certain trustees of the "Irish Republic" in a New York City bank. The sum represented the unexpended balance of more than \$6,000,000 which had been subscribed by various persons in the United States for the independence of Ireland. The Irish Free State claimed the funds as the successor of the said "Republic", irrespective of whether the court should hold that the latter organization was a *de facto* government or merely a revolutionary organization without a *de facto* status. Two committees representing the holders of the certificates which had been issued to the subscribers were allowed to intervene in the suit. One of them contested the claim of the Free State on the ground that, the independence of the Irish Republic never having been achieved,

there had been a failure of trust and consequently the funds remaining unexpended should be distributed *pro rata* among the subscribers, or, alternatively, that in case the court should sustain the claim of the Free State they should be adjudged to the latter, subject to the condition that it should pay the certificate holders the full amount of their subscriptions with accrued interest. The other committee admitted the right of the Free State to the funds, subject to the condition that it be required to issue bonds in exchange for the certificates. The Free State, on its part, argued that since it was a sovereign Power, the court had no jurisdiction to impose such a condition upon its freedom of action. In support of the contention that it was the *de iure* successor of the organization which raised the funds, Counsel relied upon the cases of *The King of the Two Sicilies v. Wilcox* (1850), 1 Sim. N.S. 334; *United States v. Prioleau* (1865), 2 Hem. & M. 559; *United States of America v. McRae* (1869), L.R., 8 Eq. 69; *Republic of Peru v. Dreyfus* (1888), 38 Ch. Div. 348, and others, which establish the rule that a *de iure* government acquires title to the property of a *de facto* government which it has succeeded. It was also contended that since the funds were raised under the authority of the *Dail Eireann* and the trustees were residents of Ireland, the question of successorship and ownership was a matter of Irish municipal law, and since the Supreme Court of Ireland had already decided that the legal title of the funds was in the Free State, the matter was *res adiudicata*.

Mr. Justice Peters, who heard the case in the New York Supreme Court, rejected the contentions of the Free State, and held that the organization of the so-called Irish Republic was merely a revolutionary group whose members were "continuously on the run" and not a *de facto* government, and hence the Free State never succeeded it. A new government, he said, could not succeed an unsuccessful revolt or rebellious organization which never became a recognized *de facto* government. If any government was entitled to the funds it was the government of Great Britain, which crushed the revolt, but it had not claimed them. It was emphasized, moreover, that the Free State Government, which claimed the funds, was in fact the government of only Southern Ireland, and hence the government of Northern Ireland had as good a claim to them as did the Free State. As to the contention that the question of successorship was solely one of Irish law, and that the whole matter was *res adiudicata* in virtue of the decision of the Supreme Court of Ireland (referred to above), Mr. Justice Peters pointed out that since the plaintiff certificate holders in the present case were not parties to the suit in the Irish courts, the judgment of the Irish Supreme Court could not be *res adiudicata* as to them. In fact, the latter court had never passed on the question as to whether the Dail organization was a *de facto* government or whether the Free State was its successor. The cases of state succession relied upon by the Free State (cited above) he thought were distinguishable from the present case, and instead of supporting the contention of the Free State were authority against it. For these several reasons he held that since the Free State was not the successor of the revolutionary organization known as the *Dail Eireann* but of the government of Great Britain and Ireland, it had no title either paramount or derivative to the funds claimed. No good purpose would be subserved by leaving them in the possession of the trustees, since the Irish Republic had never been established. The only persons, therefore, entitled to the funds were the original subscribers, and to them they were adjudged on the basis of the proportional amount of their subscriptions.

J. W. GARNER.

REVIEWS OF BOOKS

Die Befriedung Europas. By Dr. G. David. Hensels & Co. 1924. Berlin. 31 pp.

This is one of the two essays which were accorded the first prize in the competition arranged in 1924 in different countries by Mr. Edward Filene, of Boston. In answer to the question "How can peace and prosperity be secured for Germany and Europe through international co-operation?", the author, a former Minister of the *Reich*, puts forward a number of suggestions. One of them is the creation of an economic European Union as the basis of a closer political co-operation. The other is the strengthening, through the Interparliamentary Union, of the bonds uniting the European democracies. The Interparliamentary Union should, in the opinion of the author, act as a substitute for the future parliament of the League of Nations. By such a parliament he understands an Assembly of the League composed not only of official representatives of states, but also of deputies directly elected by the peoples themselves.

Prize Law during the World War. By James Wilford Garner. New York: The Macmillan Company. 1927. 8vo. pp. xlviii and 712. (\$5.00.)

No war of the past has produced so extensive an output of prize jurisprudence as the war of 1914-18. The English-speaking legal world will welcome this volume of Professor Garner, in which the author has brought together under appropriate headings the decisions of all the belligerent Powers, except those of Russia, Turkey, Portugal, and Rumania, which the author was unable to obtain. It is singular that two important maritime states, the United States of America and Brazil, did not organize prize courts, and enemy ships in their ports were confiscated by legislative measures.

Professor Garner pays a well-merited tribute to the work of Sir Samuel Evans, who bore the burden and heat of the day in the English Prize Court; he also acknowledges the value of the judgments delivered by Lords Parker and Sumner in the Judicial Committee of the Privy Council. He rates the decisions of the prize courts of the other states at a lower level than those of the British prize courts by reason of the fact that their judges were for the most part government officials or naval officers, and that their judgments were generally too brief or too lacking in reasoned argument to be of scientific value. He considers, however, that the decisions of the Belgian prize courts in the later stages of the war and some of the German decisions were well-reasoned and supported by authority.

The first four chapters are concerned with the fundamentals of the subject, the function and organization of prize courts, their jurisdiction, prize court procedure and the law applied in those courts. They form a valuable contribution to the study of this important branch of law, and show how, with the exception of the British prize courts, the decisions of prize courts generally are restricted by governmental regulations, and that rules of international law are only applied so far as there is no conflict between them and the state regulations. As regards the decisions on the Hague Conventions, those which are concerned with the "Kriege" or "Solidarity" clause are of special importance. The existence of this clause raised, and will raise in some future war, difficult questions which

ought to be taken into consideration before the occasion arises to apply these conventions. The chapters on nationality of ships and goods and on contraband are especially to be noted.

Professor Garner is to be congratulated on the thoroughness and the impartiality of his work. His aim, as he tells us, was to give a survey of the organization, function, and jurisdiction of prize courts during the World War, to analyse the mass of prize jurisprudence, to summarize and compare the interpretation and the conclusions of the various prize courts and to point out the divergencies of opinion and doctrine which they enunciated. He has successfully accomplished his purpose.

A. PEARCE HIGGINS.

American Foreign Policies. By Professor J. W. Garner. New York University Press, New York. (\$6.00.)

This volume contains the text of a course of lectures delivered at the University of New York by Professor Garner of Illinois, when holding the appointment of James Stokes lecturer on politics. In these lectures the Professor examines and criticizes many of the features of the foreign policy of the United States since the war.

In the first lecture several of the factors which have influenced the American people and the Administration in their foreign policy are analysed: the tradition which Washington and the founders of the republic inculcated, that the United States must hold aloof from Europe; the provincialism of the mass of the people and their lack of interest in foreign affairs; the way in which they rally to the slogans of chauvinistic demagogues; the extent to which the votes of the foreign-born element in the population are courted by self-seeking politicians; the irresponsibility of the Senate and the havoc that it makes of the efforts of those who are responsible for guiding the foreign policies of the country; and lastly the fierce desire for economic expansion and the financial strength to which the United States has now attained.

In the later chapters the Professor investigates some of the supposed guiding principles of American policy—as for instance that of non-intervention in the affairs of other states—and shows that though the United States has generally refused to act jointly with other Powers in the prosecution of common policies even of the most beneficent character, the rule has not infrequently been departed from when there were advantages to be gained which appeared to make it worth while. Similarly he shows that the imperialism which the Americans have been so ready to condemn in the policies of other countries has been rampant in the policy of their own country.

In another chapter the Monroe doctrine is discussed and found in its present phases to be an obstacle to good relations with Latin America and an excuse for refusal to co-operate with the rest of the world for the promotion of international solidarity and the advancement of the general peace. The Professor also condemns the record of the United States as to the advancement of arbitration. He shows that, largely by reason of the action of the Senate, the practice of the United States has fallen far short of the constant declarations by Presidents and Secretaries of State in favour of arbitration as the means of settling international disputes.

The lectures end with two chapters on the failure of the United States to co-operate in the work for peace of the League of Nations and on the views of the United States now held by foreign countries.

The volume is emphatically one for American readers—not for those of other countries. Many of the criticisms which Professor Garner makes on the foreign policies of the United States during recent years are severe, but the shortcomings which he exposes, if his criticisms are well founded, are in great part faults for which the American people as a whole must bear the responsibility. Congress and the Administration have only reflected the public opinion of the country.

Assuming that the reproaches which the Professor addresses to his countrymen are just, the lectures should have great weight with thinking and educated Americans, but nothing is so likely to destroy their effect as a belief in the United States that the men of foreign countries are greedily absorbing the contents of the volume and are adopting as their own the reproaches which it contains. C.

The Struggle for the Falkland Islands : A Study in Legal and Diplomatic History.
By Julius Goebel, Jr. Yale University Press. London : Milford. pp. xiii and 482. (23s. net.)

This book states competently and in an interesting manner the Argentine case for ownership of the Falkland Islands. The historical, diplomatic, and legal facts are outlined, and, in regard to the first and the last, no important source is left untouched to provide the reader with the essential data for forming a judgment. Those parts of the book which touch upon diplomatic history and arguments are necessarily incomplete, because not all the old documents and scarcely any of the more modern ones have been available to the author. Although the reader may, on closing the book, ask himself what is the good of it all from a practical point of view, he cannot but admire the extraordinary patience and erudition of Dr. Goebel in having gathered together such a mass of interesting historical material.

The key to the book is to be found on the last page. After showing by a variety of arguments that Spain was the "rightful" owner of the Falklands, and that, by the *uti possidetis* of 1810, this right was transferred to Argentina, the author states :

" . . . the present masters of the Falklands have called upon the law to testify to the justice of their acts, and it is proper, therefore, that what this law is should be set forth and understood . . . because the law which states have painstakingly wrought to govern their relations is too precious a heritage to be suborned to cover the imperialistic designs of any nation."

In his main argument, showing that Spain was the rightful owner of the Falklands before the Argentine, the author quotes the famous declaration of Prince de Masserano, made in 1771, whereby Port Egmont was delivered by Spain to Great Britain, thus showing the acknowledged hold which Great Britain had on the islands. In the first quarter of the nineteenth century Spain completely abandoned the islands. The first assertion of a claim to the possession of the Falklands on the part of a Buenos Ayres government was made in 1820 by a Daniel Jewett, who was, curiously enough, a native of Pennsylvania. During the turbulent years which followed there were other attempts of an indefinite nature to acquire the ownership of the islands on behalf of Argentina, until in 1829 the British Consul-General in Buenos Ayres was instructed to assert categorically the British claim, which was founded upon : (a) original discovery ; (b) sub-

sequent occupation ; (c) sanction from the restoration by the King of Spain of the British settlement at Egmont in 1771 (which had been seized by the Spaniards in the previous year). To this might be added another episode, of considerable importance, but apparently overlooked by Dr. Goebel. On March 15, 1771, Lord Rochford requested the Admiralty to instruct the commander of the British naval expedition sent to the Falklands that " if the Spanish commander should make any protest against His Majesty's right to Port Egmont or the Falklands, he should answer the same by a counter protest, in proper terms, of His Majesty's right to the whole of the said islands, and against the right of His Catholic Majesty to any part of the same ". Captain Stott reported that the transaction had been " effected with the greatest appearance of good faith without the least claim or reserve being made by the Spanish officer in behalf of his Court ". The period from 1771 to 1832 is barren of incidents of importance, but in 1832 there were two noteworthy occurrences ; first, the British Admiralty were instructed to take whatever measures might be necessary to visit the Falkland Islands annually ; and secondly, Mr. Baylies, the United States chargé d'affaires, in the course of a correspondence with the Argentine Government, denied *in toto* the claims of the Argentine Republic to the sovereignty either of the Falkland Islands or of any other islands east of South America to the south of 40° south latitude. Mr. Baylies went farther, for he deduced from prior discovery and first possession the title of the Crown of Great Britain to the sovereignty of the islands in question. One would think that these facts considered together with the occupation of the Falklands by Great Britain, their development for sheep-farming and their use as a whaling-station by British subjects during the last hundred years, and their complete neglect by possible settlers from the Argentine, would be sufficient to convince most people of the sovereign right of England. That the position is so accepted is quite clear from recent history. No political party in the Argentine now thinks an agitation on the subject to be worth while. On the other hand the commercial links between the two countries and the extremely friendly diplomatic relations that have long existed, are assets too valuable to be endangered by an academic squabble regarding rights that have long since been settled by the good sense of both parties. In conclusion, while Dr. Goebel deserves to be complimented for a statement which, within purely academic limits, is excellent, one cannot but feel that his book is likely to be more valuable to minor politicians in the Argentine—they may be grateful for historical and legal missiles to hurl at the government in power—than it will be to men of vision.

C. D.

The Law of Territorial Waters and Maritime Jurisdiction. By Philip C. Jessup, LL.B., M.A. New York : G. A. Jennings Co. Inc. 1927. xxxviii and 548 pp. (\$9.00.)

This is an excellent book. Territorial waters is one of the three subjects which the Assembly of the League of Nations decided in September last should form part of the programme of the Codification Conference which it is hoped to hold in 1929. An exhaustive study of the whole subject, based on practice and not on theory, should be most useful to all those who are engaged in preparing for or who are likely to participate in that conference. Throughout his work Mr. Jessup has striven to explain the views upheld by each of the more important states ; if agreement is to be achieved at the proposed conference there must be

willingness on the part of the governments which are represented to allow for the peculiar needs of individual states, and for this the first requirement is a knowledge of the law and the practice which each state follows.

Mr. Jessup is wise enough to explain in an introductory chapter the meaning in which he uses in the book the words "jurisdiction" and "control". He is probably right in saying that a great part of the disagreement as to the extent of territorial waters is due to confusion on this point.

In Chapter I the author deals exhaustively with the three-mile limit and, after examining the views of all the more important states, arrives at the conclusion that the usage and practice of nations has created a rule of customary international law that a three-mile limit marks the boundary of the zone of marginal waters within which the state has sovereign rights, but that the Scandinavian countries have some claims to a prescriptive right to a four-mile area.

In Chapter II, Mr. Jessup deals with claims by states to exercise some measure of control outside the three-mile limit for the protection of their national interests. In view of the controversies to which the enforcement of the American Prohibition Act gave rise before the Liquor Treaties came into force, this chapter is of great interest. The author's conclusion, based largely on the dictum of Marshall C.J. in *Church v. Hubbert* [1804, 2 Cranch 187] is that if acts of control and jurisdiction carried out on the high seas are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure the laws from violation, they will be submitted to. Such acts may in fact be held legal if they meet the test of reasonableness.

Whether the territorial waters of a state are subject to its sovereignty, or subject only to a bundle of servitudes in favour of the riparian state, is a problem which has delighted professors, but has never troubled governments. Governments regard such waters as subject to the sovereignty of the state, and they said so in 1919 when they concluded the Air Navigation Convention. Mr. Jessup follows the governments and not the professors, and is clearly right in so doing, but he regards the waters of a port as part of the territorial waters, and there he seems to be equally clearly wrong. The right of innocent passage is uncontested; it is a servitude of which the existence is not inconsistent with the sovereignty of the littoral state, but there is no right of innocent passage through the waters of a port, any more than there is through the inner waters of a bay, and to class the waters of a port or the inner waters of a bay as territorial would necessitate a differentiation between territorial waters which were subject to the right of passage and those which were not.

The extent to which merchant vessels in a foreign port come under the local jurisdiction is well and thoroughly discussed. The practice of the various governments is ably stated. It is clear that, whatever may be the theoretical divergence between the Anglo-American view on one side and the French and Italian views on the other, there is but little difference in practice. The wider jurisdiction which exists in theory under the former system is not as a rule exercised except in cases where jurisdiction would exist and be exercised under the continental system.

There are useful chapters on the enforcement of the American prohibition laws in the territorial belt and the waters contiguous thereto, and on the various decisions which have been rendered by the American courts in the cases which

have arisen out of such enforcement. These chapters are naturally of greater interest to American readers than to others, but they are worthy of general study.

Bays receive exhaustive treatment. Not only is there a full statement of the general principles applicable to all bays, but there is individual treatment of each of the "historic bays".

Enough has been said to show what a useful book Mr. Jessup has produced, and its utility for reference purposes is increased by a good index. C.

Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg, besonders durch den Locarno-Pakt. By Paul Kaufmann. Robert Noske, 1927, Leipzig. 77 pp.

Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg. By H. W. Thieme. Robert Noske, 1927, Leipzig. 85 pp.

Der völkerrechtliche Garantievertrag, insbesondere seit der Entstehung des Genfer Völkerbundes. By Dr. O. Bussmann. Robert Noske, 1927, Leipzig. 66 pp.

These three monographs are issued in a series called *Frankfurter Abhandlungen zum Kriegeverhütungsrecht*, edited by Professors Giese and Strupp. The editors regard the branch of international law which deals with the prevention of war as of special importance at the present time, and the series is entirely devoted to publications dealing with this subject. The idea is a useful one, and it may be hoped that further monographs will follow. There is room in such contributions for original research and independent judgment, although the scope of the first two monographs is perhaps so wide as to render possible something more than a casual treatment of the subject. Both cover almost the same ground: the distinction between arbitration and judicial settlement, the relation of arbitration to the Covenant of the League, the Permanent Court of International Justice, treaties of conciliation, the Geneva protocol and the Locarno agreement. They are a general survey of the development of the machinery of pacific settlement of international disputes since the World War. There is no reference to actual disputes or to cases decided by the Permanent Court and by the numerous arbitral tribunals after the World War. From this point of view the monographs rely on second-hand sources and are rather disappointing. Thus, to quote one instance, Mr. Kaufmann tells us that Professor Niemeyer states in an article that the Permanent Court of International Justice had rendered a certain number of judgments and advisory opinions. We have to-day more direct sources for ascertaining facts of this kind. However, as concise historical introductions to the subject the two monographs will be found useful, and some chapters, such as that on "Sovereignty and Arbitration" in Mr. Thieme's book or on the Locarno Pact in Mr. Kaufmann's monograph, are interesting and valuable.

Dr. Bussmann's short monograph on treaties of guarantee, in particular those concluded since the creation of the League of Nations, can be recommended to every student of the subject. The author has wisely refrained from elaborating the ground already covered by others, and he devotes himself mainly to such points as may become of practical interest. There are chapters on the requirements of the validity of treaties of guarantee, on the dangers of stereotyping the existing legal *status quo*, on Article X of the Covenant, and on the nature and objects of treaties of guarantee. The book ends where one would have expected

it to begin, namely, with a discussion of the conception and definition of treaties of guarantee. It is a thoroughly up-to-date contribution, as may, for instance, be seen in the section distinguishing treaties of guarantee from treaties of alliance and discussing the numerous post-war conventions concluded between the states members of the "Little Entente" and also between other countries.

H. L.

Die "avoirs en numéraire" (cash assets) im Verträge von Versailles. By Ernst Keetman. F. Dümmlers, Berlin, 1928. (Völkerrechtsfragen, H. Pohl und M. Wenzel, 23. Heft.) 50 pp. (Marks 2.75.)

This is a contribution to the collection of short treatises on different questions of international law or practice published under the auspices of Professor Pohl of Tübingen, and his colleague Max Wenzel. The author discusses very fully the somewhat limited subject which he has made his own, namely, the interpretation to be given to the not very clear expression "cash assets" which is used in Article 297 of the Treaty of Versailles. He has made a careful study of the relevant decisions, not always harmonious, of the different Mixed Arbitral Tribunals. His book should be of value to any one who has to deal, whether as an advocate before a tribunal or otherwise, with the difficult questions which experience has shown to be involved in the administration of Article 297. It is satisfactory to find that after not a little criticism of some decisions of the Mixed Tribunals the author ends his work by saying that: "In so far as the questions raised by the Treaty of Versailles are subject to the decision of the Mixed Tribunals, the unilateral will of one party, its *sic volo sic iubeo*, cannot be decisive. In this field the final authorities are principles of law, legal arguments, results of inquiries as to the origins of the text of the treaty" (an English lawyer will here intercalate a sign of caution) "and judicial pronouncements which by their convincing force and decision have operated to establish the law."

One further remark: the author (page 13) says that the English words "cash assets" are taken from Italian—*cassa* and *asse*. The shorter Oxford Dictionary of the English language derives both words from French—*caisse* and the earlier form of *assez*.

J. F. W.

Quakers and Peace. By G. W. Knowles. (Grotius Society.) Sweet & Maxwell. (2s. 6d.)

Setting out to explain the traditional attitude of the Society of Friends in regard to war and peace, Mr. Knowles has collected a number of characteristic declarations, either individual or collective, on the subject and prefaced them with a brief survey of the Quaker position, with special reference, naturally, to the attitude adopted by most Friends in 1914. One of Mr. Knowles's earliest quotations, from George Fox's *Journal*, records the offer to Fox of a captaincy in the Commonwealth Army and his reply that he "lived in the virtue of that life and power that took away the occasion of all wars". Not Fox's words but the spirit behind them has always been the chief factor in determining the attitude of Friends regarding war, and Mr. Knowles points out with justice that this testimony "is not based on any particular text of Scripture or confined to any particular war. It is based upon the rooted conviction of the fundamental contradiction between the spirit of Christ and the spirit of war". Mr. Knowles describes the working out of this conviction without discussing the important but

perplexing problems to which it gives rise, most of all the conflict inevitable between individuals who adopt such an attitude and a society which does not. The whole question of conscientious objection, which Mr. Knowles deals with briefly but not inadequately on the scale possible in his short introduction, is worth that dispassionate discussion which is possible now as it was not ten or twelve years ago. So far the difference between the men who fought and those who did not has too often been presented in the harsh contrasts of black and white. In numbers of cases in actual fact there was a very close resemblance between the mental attitudes of men who after much conflict of mind came just to the conclusion that they must fight and others who after equal conflict came just to the conclusion that they could not. Mr. Knowles's collection of relevant extracts from the writings of Fox, Penn, and others, is interesting and representative. Pennington, however, should be Penington. H. WILSON HARRIS.

Die völkerrechtliche Option. By Dr. Josef L. Kunz. Vol. I (1925), xiv and 328 pp.; Vol. II (1928), xvi and 356 pp. Hirt, Breslau.

Since the appearance, some fifty years ago, of Stoerk's monograph on "Option and Plebiscite", no international lawyer has undertaken the task of a detailed treatment, both historically and systematically, of Option. Dr. Kunz has done it now in a scholarly and useful work which should be recommended to all students of the subject of nationality in general and of option in particular. The treatise is almost overdue, for the part which option played in settling various questions of nationality in the peace settlement after the World War was a stupendous one. Thus, for instance, in the Treaty of Versailles varying provisions in regard to option were laid down with regard to territories ceded to Belgium, France, Poland, Czechoslovakia, Denmark, as well as in respect of the Saar, Memel, Danzig, the leased territory and the colonies. In the Austrian and Turkish treaties an important development of the old institution took place to meet new circumstances owing to the fact that the contracting parties were confronted not only with cession or annexation, but also with the dismemberment of the two empires. Accordingly, opportunity was provided for opting not only for the old nationality, but also for that of any of the new states. It is not surprising, therefore, that Dr. Kunz found it necessary to devote almost the whole second volume to a detailed examination of the relevant provisions of the Treaty of St. Germain. The first volume, however, is of more general interest. It begins with a discussion of the position of the individual in international law, of state succession and of the legal nature of state territory. After a detailed examination of the older form of option, which consisted merely in the permission to emigrate, the author devotes the bulk of the volume to a well-ordered account of option as practised since the second half of the nineteenth century. He discusses it from the political, philosophical, and, with special care, from the juridical point of view. There follows an account of the working of that institution in regard to women, minors, military persons, officials, &c., and of its technique. The volume concludes with an examination of the relevant provisions of the Treaty of Versailles.

It is not quite clear why the author thought it necessary to limit his investigation to the Treaties of Versailles and St. Germain and, apart from extracts from the relevant treaties, to ignore the different applications of option in regard to the territorial changes affecting Russia, Turkey, and Bulgaria. We should

also have liked to hear from him an account of the new practice of compulsory exchange of population, which is in a sense a compulsory option without an intervening cession of territory. And it seems a pity that he altogether fails to deal with the judicial application of option by national and international courts. Surely the question came before more than one Mixed Arbitral Tribunal, and we know that there is a large number of decisions of national courts bearing upon this question. There is no index to either of the two volumes. On the whole a case could be made out for a short supplementary volume. H. L.

Private Law Sources and Analogies of International Law. By H. Lauterpacht, Dr. Jur., Dr. Sc. Pol. (Vienna), LL.D. (London). Longmans Green & Co., Ltd. pp. xiii and 326. (25s.)

Dr. Lauterpacht is quite justified when he says in his introductory chapter: "In the whole field of international law there is hardly a question of equal practical and theoretical importance to which less systematic attention has been paid than the problem of private law sources and analogies of international public law." There is, as he says, "no single monograph on the subject, notwithstanding the fact that it occurs repeatedly in the framing of international law as a science, in the interpretation and construction of treaties, and in the judicial settlement of controversies between states". The question is raised in the most practical and concrete form by Article 38 of the Statute of the Permanent Court of International Justice. That article prescribes the law which the court is to apply, or perhaps it would be more accurate to say the sources from whence the principles, on which its decisions are based, are to be sought. The court is to apply, in the first place, "International conventions . . . establishing rules expressly recognized by the contesting states". Secondly, "International custom, as evidence of a general practice accepted as law". Thirdly, "The general principles of law recognized by civilized nations". Dr. Lauterpacht says that his work is a commentary "on Article 38 (3) of the Statute". Dr. McNair, in his foreword, with a confidence which the work certainly merits, says it is a "justification of Article 38 (3)".

The "general principles of law" to which the Statute refers must be principles of municipal law (and indeed in general of that department of municipal which is generally called "private" law) or else that abstraction of common principles of municipal law, "general jurisprudence", for, as Dr. Lauterpacht shows, there is in fact nothing else that could be meant, and in practice principles of private law which are recognized in all civilized laws, and principles of jurisprudence must come to the same thing. The problem relates, therefore, to the application to the transactions of state and state of principles of municipal law regulating the conduct of individuals and its consequences—such principles as those of estoppel by conduct, estoppel by judgment or the rules of interpretation of agreements form instances of the clearest kind. Dr. Lauterpacht, however, argues very convincingly that the problem is a wider one than this. There are institutions of international law, such as treaties, territorial sovereignty, state succession, state responsibility for delinquencies, which are analogous to institutions of municipal law—contracts, ownership of property, successions upon death, liability in tort—and we have also to consider the application of general principles of private law governing these institutions for the determination of the rights and duties of states incidental to the former.

In what circumstances and to what extent can principles of municipal law be applied to the sphere of international law? To what extent has international law developed in this way in the past? How far is their application justifiable from the theoretical point of view? Has it been beneficial in the past and will the continuance of the practice be beneficial in the future to the development of international law? All these questions are dealt with in this work. The conclusion to which Dr. Lauterpacht comes is in every case in favour of "private law" as a source of international law. The dangers and difficulties of the use of private law principles and analogies (and especially in the case of "analogies") are many, but Dr. Lauterpacht does not ignore them.

The first (and by no means the least interesting) part of the book is devoted to a consideration of the problem from the theoretical point of view. The author explains that "it has become intimately connected with the controversy between the positivists and natural law tendencies and with the ultimate victory of the positivist school. . . . The same forces which were fighting the influences of the law of nature advocated with vigour the purification of international law from its private law ingredients. The positive disapproval of recourse to private law found, on the other hand, an ally in the current doctrine of sovereignty which brought about, *inter alia*, a conception of international law regulating interests of a higher value and adjusting public rights of an 'eternal and inalienable' character". The last reference is, of course, to the theories of Hegel and Bosanquet, which lead to the anarchical conclusion that the state is only bound by rules of international law in so far as it is in its interests to be so. To English readers who are most familiar with the works of English and American authors and in the habit of considering themselves positivists, this statement is at first rather surprising. But Dr. Lauterpacht, who is obviously well read in Continental authors, amply justifies it and shows clearly that English positivists, like Hall or Oppenheim, never really adopted these theories of the state and sovereignty, and by an extensive use of the "fiction" of implied consent of states to international rules, modified their "positivism" to a point where its results are not far different from "naturalism". Dr. Lauterpacht's criticisms of positivism and of these theories of sovereignty are extremely cogent. In his criticism, however, of the view of the exceptional nature of the interests of states, he allows himself to be drawn into an attempt to disprove the classical theory that international law only imposes rights and duties upon states and that individuals are the objects but never the subjects of international law. He supports this by arguments derived (*inter alia*) from the doctrine of English law that international law is part of the law of England and from the provisions of the constitutions of the United States (and other countries) under which treaties become enforceable in the courts in the same manner as statutes.

These arguments are, of course, in no way conclusive, for it is not unnatural that a state being bound towards other states under treaty or international law, to enforce certain conduct upon individuals, should entrust to its courts the interpretation and execution of its duties, and in that way make them part of its municipal law, the courts being, from the point of view of international law, one of the organs of the state for whose deficiencies the state is responsible just as much as it is for the acts of the executive, the acts of the courts being, in fact, the acts of the state.

The difficulties, practical and theoretical, of the rejection of the classical

theory are certainly as great as—and probably greater than—those which the theory creates. But whatever the true answer to this question, it is in no way essential to Dr. Lauterpacht's theses on private law as a source of international law.

In the second part of this book Dr. Lauterpacht investigates the practice of states with reference to the use of private law as a source of international law, and here he is on the strongest ground. The most convincing proof is to be found in a long series of international arbitrations where, time after time, owing to the deficiencies of international law and the absence of "positive" international rules, states have been forced to adopt in their references to arbitration formulae of varying kinds, but all leading to the same effect as Article 38 (3) of the Statute of the Permanent Court, under which the tribunals have thought themselves authorized to apply principles of municipal law and, in order to find a solution, have been compelled to do so.

In this part of the book analogies between various institutions of international law and of municipal law are discussed, such as territorial sovereignty, sovereignty over territorial waters and air, prescription, servitudes, state succession and responsibility, measure of damages, treaties, leases, and mandates. If in some instances it may be thought that the author falls into the danger of pushing the analogy too far, on the whole he makes a good case for the use of private law analogies, though it is in the case of such conceptions as sovereignty and succession that the wide difference in the subject-matter makes the analogies most doubtful. The discussion of the question of who is the sovereign of mandated or leased territory (certainly a question on which writers have disagreed widely) is possibly an example, for there is much to be said for the practical view that sovereignty is the counterpart of international responsibility and that the state who is for the time internationally responsible for what takes place in the territory must be regarded as a sovereign, rather than for adopting, as Dr. Lauterpacht tends to do, the tests of ownership of property, "the rights of disposition, or using, or abusing".

The last part of this work is devoted to a very instructive review of the more important international arbitrations, and shows the remarkable extent to which the parties put forward arguments based on principles of municipal law and the remarkable number of instances in which the tribunal found such principles suitable for application in the international sphere.

There are other branches of international law in which the decisions of municipal tribunals and municipal systems of law are rightly relied upon as sources of international law, of which Dr. Lauterpacht in this work says nothing, and quite properly, for the problem here is an entirely different one and it is important to keep it distinct. In the matter, for instance, of immunity of foreign states and diplomatists from the jurisdiction, and in the sphere of prize law, the decisions of national tribunals are indeed most fruitful sources of the law of nations. But this is not a case of the adoption of principles or analogies of municipal for the purposes of international law, but of the decisions of national tribunals on questions of international law; this indeed is the most common view, though, as the national tribunals are as a rule bound to a greater or less extent by their own precedents or by the practice of their own states and are not as free as an international tribunal to consider on an equal footing all authorities on international law, it is arguable that these are really decisions of

municipal law relating to these matters and their primary value is as evidence of the practice of their own states upon these questions adopted on mature consideration.

Such decisions are, however—whether as instances of state practice or as decisions on international law—valuable sources of international law (the more valuable in proportion as the courts giving them are free to take into consideration all international authorities), and as such they are recognized by Article 38 of the Statute of the Permanent Court. They do not come, however, under Article 38 (3), but under Article 38 (4), “judicial decisions”, for the better opinion is certainly that the decisions of municipal courts as well as those of international tribunals are included under this heading. This source of international law—judicial decisions—is also in great need of scientific treatment and collation, and Dr. Lauterpacht (with Dr. McNair, who wrote the foreword to this work) is shortly to add to his services to the scientific development of international law by the editing of an annual digest of judicial decisions on questions of international law, which will be of great value to all students of the law of nations.

The work under review—this commentary on Article 38 (3) on the application of private law principles and analogies in the international sphere—is a valuable contribution to the science of international law. It does not claim to be a treatise but a monograph only, but it is a first blazing of the trail on practically new ground and, being copiously annotated with references throughout and well indexed, it is a work which those who disagree as well as those who agree with the author's conclusions cannot fail to find useful.

Dr. Lauterpacht comes from Vienna to teach and study international law in England and this promising beginning will evoke memories of Oppenheim who also came to England from the Continent—*favete linguis*. E.

Essai sur le Désarmement et le Pacte de la Société des Nations. By M. de Lavallaz. Rousseau & C^{ie}, Paris, 1926. pp. xlv and 505. (15s. net.)

M. de Lavallaz proposed in this large book to make a comprehensive study of the political and juridical aspects of the question of International Disarmament, leaving wholly out of account the technical problems which disarmament involves. His method, however, is neither political nor legal, but historical, and he divides his work into three separate parts, entitled respectively *Le Désarmement avant 1914*; *L'Idée de Désarmement pendant la Grande Guerre*; *Le Désarmement et le Traité de Versailles*. In each part he gives a combined chronological and analytical account of the events and discussions, both governmental and private, concerning the question of armaments, that took place respectively during the century 1815–1914, during the years 1914–18, and during the years 1918–26.

M. de Lavallaz has succeeded in showing that the subject which he chose was well worthy of the work which he devoted to it. Indeed, he has shown that it was worthy both of more work and of more discrimination, for unfortunately there is no section of the book of which it is possible to say that it is either adequate or sound. A few examples may serve to justify this rather sweeping criticism.

In his review of the events and discussions of the nineteenth century M. de Lavallaz accords exactly twenty-nine lines to the Rush-Bagot Treaty by which the Great Lakes between Canada and the United States of America were dis-

armed, and it is plain from what he says that he has no conception of the vastly important political and legal results to which that treaty led. He barely mentions a memorandum written by Lord Salisbury which so impressed the German Emperor that the latter proposed privately that a special European Congress on the armament problem should be summoned. He fails to give his readers anywhere in the book the text of the Czar's Rescript of 1898 on the Burden of Armaments, which led to the summoning of the two Hague Conferences. Likewise, in his second part, M. de Lavallaz elaborately discusses the problem of international sanctions in connexion with the League of Nations, he deals in detail with the speeches and writings of M. Bourgeois and President Wilson; yet he fails to mention the Phillimore Report, from which Article 16 of the Covenant was taken almost word for word. In his third part, he discusses at great length the opinions of various post-war authors who have written about the League; but there is no evidence that he has ever read any of the decisively important disarmament discussions in the Assembly of the League itself.

The value of M. de Lavallaz's historical work is further reduced by another serious defect. In the preface he promises the reader that he will not himself express his personal opinions on any controversial points. Yet, to quote only a few of the many examples that could be given, in the body of his work he declares that the Hague Conferences were *une grande illusion*; that they exercised an influence *indiscutablement néfaste*; that compulsory arbitration without sanctions is an illusion which *ne conduira jamais à rien*; that all pre-war attempts to deal with armaments were an *imbécillité* (in that he agrees with the ex-Kaiser); that the war effected no real change in European opinion about international politics, *elle n'en transforma que la surface*; that M. Léon Bourgeois was a "Utopian"; that President Wilson could only have hoped to realize his programme by remaining neutral in the war; that the Covenant of the League in no way restricts the sovereignty of states Members of the League; that under the system of the Covenant war remains, as it was before 1914, *l'ultima ratio*; that *ce système* (of the Covenant) *ne diffère pas, quant au fond, de celui qui régissait l'Europe avant 1914*. M. de Lavallaz, of course, has a perfect right to express his opinions, even after he has voluntarily promised not to; but it is unfortunate that his material is carefully selected and arranged to support the opinions he expounds.

Even his entirely theoretical exposition of Articles 8 and 9, which should be the very essence of his subject, leaves much to be desired; he wholly neglects the rôle of the Assembly in the matter; and some of his comments border on the extravagant. In one place he speaks of the Preamble to Part V of the Treaty of Versailles as a binding legal obligation on the Allies to disarm; in another place he denies that it has any binding force; in neither place does he reproduce the vitally important correspondence between the Allies and the German Delegation on the point. Apart from this and other discussions of the meaning of the Covenant, there is little in the book that concerns the international lawyer; and in his excursions into the general doctrine of state sovereignty M. de Lavallaz would not find much support from leading authorities of the present day.

Yet notwithstanding its serious defects, the book contains much material that will be of value to the student. The practical worth of this material would have been enhanced if M. de Lavallaz had corrected his proofs, verified his references to the Articles of the Covenant (a considerable number of them are wrong), and added an index.

P. J. NOEL BAKER.

Principes de Droit Administratif du Japon. By Yorodzu Oda, Judge of the Permanent Court of International Justice. Recueil Sirey, 1928. 578 pp.

The chief and probably most lasting impression left by this work of M. Oda is that of a new and respectful admiration for the members of his race. We, who regard Japan as one of the leading Powers of the world, would assume, as a matter of course, that her internal system should be old and well organized: to be reminded, as one is by M. Oda, that a cabinet on western lines made its first appearance in 1885; to learn that the reorganization introduced with the régime of the Meiji in 1868 needed two more reforms, as fundamental again, within ten years to produce a workable system; that local government as it is found to-day dates from 1872, and that it was that year "which definitely saw the end of the feudal system", while universal suffrage only appeared in local elections in 1926, leaves one to marvel at the possibilities which must lie in store for the race which in fifty years can build a leading democratic Power on the foundations of an oriental empire.

As a jurist M. Oda cannot but compel respectful admiration. His analysis of the juristic problems raised by the existence of a *droit administratif* shows a familiarity with the works and reasoning of all the great jurists of the Continent. Furthermore, his method will commend itself especially to readers of Anglo-Saxon race; while understanding and admitting the distinctions between the French and the German theories of *droit administratif*, he is not afraid to lay down that the basic principle that the action of the state should be limited by definite rules is common to each, and that it is not of supreme importance whether such limit be imposed by the objective supremacy of the state, or the subjective priority of rules of law. Again, his treatment of the *personne morale de droit public* will commend itself readily to Anglo-Saxon readers. He can be described neither as "realist" nor "fictionist"; but he recognizes that, though the *groupement public* is not a *personne morale de droit privé*, it has a corporate existence which is a real and definite entity, and which is at the same time conferred upon it only by the action of the state. At the same time he does not shrink from saying that the state has itself a definite and real personality, and sees no reason why he should follow those who hold such a personality a dangerous and false conception. In short, he takes the facts of the modern world as he finds them and is not afraid to admit that juristic theories, while good as theories, must mould themselves to the facts.

The status and responsibilities of civil servants are well defined and well treated. Japan has not followed France in refusing to allow questions raising the illegality of the acts of civil servants to come before the courts. She has no Rule of Law as it exists in this country, for, as in all countries which contain a code of *Droit Administratif*, an act of state must be *entaché de vice* in the Administrative Courts; but a civil servant may be sued in the civil courts, and the fact that his act was an official one is no defence at law, though "Equity" will apparently admit such a defence as being of some weight—to what extent, in the silence of the *Code Civil*, it is hard to say. Nor is an *autorisation préalable* necessary before criminal proceedings are inaugurated. Similarly in Japan, unlike France, the state may be sued both in the character of employer and of principal. The controversies which have arisen in France over the butcher's shop at Bordeaux, and the shooting gallery in the local fair, in the matter of *faute de service* and *faute personnelle* find no place in the jurisprudence of Japan.

In the matter of service discipline, the idea of a *conseil de discipline*, before which every superior must bring any penalty he proposes to inflict, is a novel one, the more so that for inferior officials the council is a local one.

Among other features which will prove interesting to English readers is the existence of what are described as *peines administratives*; these, the creatures of local police regulations, are contrasted with the *peines du droit pénal*, an idea quite foreign to that of the Rule of Law. In fact the statement that the powers of the police should be *sans rapport avec les actes du droit privé* is, to say the least of it, startling. On the other hand, though the Rule of Law gives a protection more absolute to the individual than the *recours* before a *tribunal administratif*, the guarantees provided by the latter against acts of state which are illegal or *ultra vires* seem well organized. In fact the *opposition*, a species of complaint by private individuals to which the official in question is bound to return an answer, might well be sighed for in this country. It is to be noted that the *Tribunal des Conflits* provided for in the Constitution is yet, thirty-seven years later, to be inaugurated. Apparently Japan's administrative system works smoothly!

In her *tutelle administrative* Japan seems again to have adopted a more liberal control than has France; whether a *budget obligatoire* is more salutary than the method of imposing duties by statute is an interesting question.

In short, for those who are attracted by an extremely accurate analysis of the phenomena of public law, of the kind which English text-book writers would be tempted to omit as superfluous, presented in an easy and readable form, the first 190 pages of this book are very strongly to be recommended. M. Oda's French is throughout impeccable, and the whole book is considerably less forbidding than at least one corresponding French text-book one might name. One is tempted to conclude by remarking that Japan must be lucky in her representative in the Permanent Court of International Justice at The Hague. R. L. HURST.

Théorie de la Société des Nations. By Robert Redslob. Rousseau. Paris, 1927. pp. 349. (45 fr.)

Since 1919 much has been written on the question whether the League of Nations is a confederation of states, a federal state, or a person *sui generis*. The first view is one of moderation and self-restraint. The second is tantamount to saying that the League is already now a super-state. The third, which will commend itself to the patient and impatient alike, is in our opinion juridically the soundest. It emphasizes the unique character of this new form of co-operation between states without prejudicing the ultimate character of the international order emanating from Geneva. This, however, is not the opinion of Professor Redslob, who prefers to think of the League in terms of a confederation of states. "It is not necessary", he says, "to create a new category. To multiply, without convincing reasons, the consecrated types, results not in enriching but in confusing the logic of institutions." Professor Redslob adduces many reasons in support of his thesis. For instance, he points out that a state must change its constitution when joining a federal state, but that such legislative action is not necessary when it becomes a party to a treaty establishing a confederation of states. He then shows that no constitutional changes were deemed necessary in the case of states joining the League.

The general impression which this book leaves upon the mind of the reader is

that, to say the least, the author's conception of the League as a confederation of states, has proved for him an embarrassing burden rather than a helpful construction. He deals in over seventy pages with the function of the League in connexion with securing and enforcing peace, and argues that, with some mental effort, this aspect of its activities can be squared with the accepted notion of a confederation of states. He is at pains to prove the same in respect of the functions of government or sovereignty exercised by the League—he calls them *pouvoirs latéraux*—over the mandated territories, the Saar and the Free City of Danzig. The chapters devoted to these three types of territories constitute distinctive contributions to the subject, but they do not seem to support the author's main thesis. It would be surprising if they did. The conception of a confederation of states is now nothing more than a relic from the past preserved with unnecessary care in text-books, a relic of an undefined and ephemeral form of a combination of states. This type of composite state has been found unsatisfactory in practice, and recently, largely owing to the criticism of the Austrian school, its theoretical foundations have been somewhat shattered. Why tie down the League to such a clumsy notion? Juridical concepts are useful vehicles of legal thinking, but there are good and bad legal conceptions. There is, perhaps, a deeper reason why Professor Redslob was thus led to burdening himself with unnecessary ballast. Apart from the function of the League as administrator and ultimate sovereign and protector of certain territories, there is only one aspect of the League which interests him, namely, the part played by the League in preventing war. But surely this is not all. The second great aim of the League, as stated in the preamble to the Covenant, is promotion of international co-operation, that vast area of voluntary international government and administration in the humanitarian, economic, scientific, and cultural fields. It is in those fields that the League has shown an ever-increasing vitality and has been a source of confidence in the possibilities of the political organization of mankind. It is perhaps to be regretted that this aspect of the League is not dealt with by Professor Redslob. This omission explains much of his predilection for the theory that the League is a confederation of states.

There will be found minor inaccuracies and omissions in this work covering a wide range of subjects. Thus, in the section dealing with Article 17 of the Covenant, an adequate mention of the Advisory Opinion in the Eastern Carelia case would not have been out of place. It would have been useful to elaborate the statement that the League "negotiates and concludes treaties" (p. 46). Also, it does not seem very accurate to say that the League has concluded with a number of states treaties for the protection of minorities.

But these are minor omissions. The treatise as a whole, written as it is by a competent scholar, can be warmly recommended to every student of international law. There is plenty of excellent judgment in this book and a healthy dynamic conception of the legal and political nature of the League. Even the necessity of construing the League as a confederation of states is, in the author's opinion, by no means a permanent one, and he envisages a development towards a more coherent political entity. And he is no doubt in the right when he says that the League of Nations is not yet a state because the peoples of the world do not yet regard it as such. The book ends with a very interesting comparison of the League with the Swiss Confederation (pp. 219–78), and the British Empire (pp. 279–318).

H. LAUTERPACHT.

Les Mandats internationaux. By D. F. W. van Rees. Paris, Librairie Arthur Rousseau. 1927. 8vo. pp. 147.

Dr. van Rees, the Dutch member and Vice-President of the Permanent Mandates Commission, has written a very useful book, the sub-title of which, "Le contrôle international de l'administration mandataire", indicates its scope. In the first part of the work the author sets forth the principles which underlie the mandatory system, and in the second part he explains the manner in which the League of Nations exercises its control over the mandatory Powers. In doing so he gives a detailed account of the part played by the Mandates Commission, its organization, its mode of work, and the manner in which it seeks to carry out its delicate task. This work is essentially consultative, and consists of preparing reports for presentation to the Council of the League. The Commission is charged with duties which are important and difficult, and Dr. van Rees shows that some of the members would like to possess more power than the Council is prepared to grant. This appears from an examination of the question whether petitioners who lodge complaints against the mandatory Powers should be heard in person, and also from the desire expressed by some members, though rejected by the Commission as a whole, that the Commission should be empowered to proceed to the mandated territory and hear evidence as to complaints on the spot. The author pays a tribute to the honest endeavour of the mandatory Powers to execute their trust in the administration of the mandated territories, and they in turn will doubtless acknowledge the conscientious manner in which the Commission is performing its duties.

A. P. H.

Die Verbindlichkeit der Beschlüsse des Völkerbundes. By Prof. Dietrich Schindler. Schweiz. Vereinigung für Internationales Recht. Société Suisse de droit international. Heft 20, 90 S. 8°. Orell Füssli Verlag, Zürich und Leipzig, 1927. (Swiss fcs. 3. M. 2.40.)

This short treatise, based on a lecture delivered to the Swiss International Law Society, deals with a question of vital interest for the development of international law and international society. Professor Schindler has taken for his subject the question, how far the decisions (*Beschlüsse*) of the Council and Assembly of the League of Nations have legally binding force, especially in relation to the Members of the League. His treatment of the matter is both scholarly and interesting; he has indeed studied, almost too thoroughly, the not inconsiderable literature which has already appeared on the subject.

No one will dispute the validity of the distinction which the author draws at the outset between decisions which have at once legal force and "recommendations" (*vœux*) which have political significance rather than legal efficacy. And different classes of *vœux* are analysed with skill. But the author seems largely inspired by that doubtful maxim "*boni est iudicis ampliare iurisdictionem*", and he argues that states are legally bound where many lawyers would not admit more than, at most, an honourable obligation of political loyalty. Thus, he contends that a decision of the Council or Assembly involves a mutual engagement between the Powers represented for the execution of the decision. But this is to give to a representative of a Power at Geneva a greater authority than that commonly enjoyed by any plenipotentiary, even in states which do not require their international engagements to be ratified by their parliaments. The position seems to us to be more nearly analogous to what happens in commercial

practice when Company A has a representative on the Board of Company B. The votes of that representative are an indication of the policy of Company A, and, in many conditions, for Company A to refuse to give value to such votes would be a breach of an honourable understanding, but this is not to say that Company A, as a body corporate, could be sued on the strength of the action of the representative director.

Similarly, on the question of the *vœux* of the Assembly, the author seems not always to bear clearly in mind the distinction between the results of a *vœu* as a political and historical event and an actual binding obligation of policy. On the question of the effect of an interpretative resolution by the Assembly—if and when one is passed unanimously—the author has an interesting discussion. He accepts the view that such a resolution would have a binding effect. The point for the present is academic. More startling perhaps is the suggestion that if the Council unanimously (except for the votes of the disputing Powers) reports that Power A should cede territory to B, B is authorized to help itself to the territory by force.

On the vexed question of the necessity of unanimity on the Council for a reference to the Permanent Court for an Advisory Opinion, the author takes the interesting view that if the question at issue is one that can be settled by a majority vote of the Council, a majority vote suffices for reference; if, on the other hand, the question requires unanimity (minus the votes of the contending parties), a similar unanimity is required for a reference. However this may be, the author does not support the view that in a dispute between A and B, either A or B can, as a matter of law, prevent the Council, whose duty it is to produce a report on the dispute, from obtaining the authoritative legal advice of which it stands in need.

That in course of time the decisions and *vœux* of the Council and Assembly will command and deserve even greater authority, must be the wish of every friend of the League; it seems, however, probable that this authority will develop, after the manner of an unwritten constitution, rather as a result of the political needs of the world and the merits of individual decisions, than by legal arguments from the text of the Covenant.

Two minor criticisms may be permitted: first, the so-called “abbreviations” by means of capital letters of the full titles of institutions give a Glozelian aspect to a page and often bewilder the reader, without shortening the labour of the printer. VBR as a hieroglyphic for the Council of the League is no shorter and is much less intelligible than “Rat”—there being in fact only one “Rat” in question throughout the article; a sentence such as “Eine Vollmacht zur Schaffung des StIG habe aber die VBV durch VBP Art. 14 nicht erhalten”, becomes an abomination (it is believed) to the gods and certainly to the “average sensual man”. Second, the value of any work of permanent value is doubled for practical purposes by an index. This book has no index. J. F. W.

Die völkerrechtliche Haftung des Staates, insbesondere bei Handlungen Privater.

By Karl Strupp. Published by the Institute for International Law at the University of Kiel, 1927. 36 pp.

To Professor Strupp belongs the merit of having to a large extent rescued the doctrine of State Responsibility from the plight into which it was brought by a number of positivist writers who had eliminated the conception of fault as adopted

by classical publicists and substituted for it the theory of absolute responsibility. In the present short monograph, which is a recapitulation of the views expressed by Professor Strupp in 1920 in a meritorious work entitled *Das völkerrechtliche Delikt*, the author confidently adheres to the view expressed seven years ago, namely, that the principle of fault holds good so far as the injury to the foreign state is due to an omission on the part of any of the organs of the state. But he still holds that the state is absolutely responsible, i.e. regardless of malice or culpable negligence, for positive acts (acts of commission) of its agents. We believe that in the overwhelming majority of cases international tribunals and practice are confronted by what Dr. Strupp calls omissions, and that the alternative group of cases is, therefore, of limited practical importance. Secondly, we venture to submit that the distinction between omission and commission is legally of a less rigid character than Professor Strupp seems to assume. On the whole, while remaining faithful, in form, to the positivist masters who introduced the doctrine of absolute responsibility, the author may be deemed to have largely abandoned it in substance. This is the only way of bringing theory into accord with the practice of states and tribunals. As Professor Strupp himself says on p. 17, this solution recommends itself to our sense of right.

Two minor points require to be mentioned. The author believes that the establishment of *diligentia quam in suis rebus* as an international standard is, as a rule, sufficient, and that it was so regarded by the parties to the Alabama arbitration. This was not so. The United States denied, in the course of the proceedings, that that rule held good. It certainly was not adopted by the tribunal.

On p. 19, when dealing with the responsibility of states for acts of their parliaments, Professor Strupp expresses the opinion that the international responsibility of a state may be engaged as the result of "an insulting resolution coming, for instance, from a deputy abusing a foreign state or its diplomatic representative, as in the recent case of a Yugoslavian deputy in regard to the Italian envoy in Belgrade". We find in text-books much loose writing on this subject, and it would be interesting to know the grounds on which Professor Strupp bases his opinion on the matter.

H. LAUTERPACHT.

Die Abänderung völkerrechtsgemässen Landesrechts, grundsätzliche Untersuchungen zum Englischen, Amerikanischen, Deutschen und Oesterreichischen Recht.

By Dr. G. A. Walz. Berlin, 1927. Dümmler. 174 pp. (M. 6.75.)

Article 4 of the new German Constitution of 1919 provided that "the universally recognized rules of international law are valid as binding constituent parts of the German Federal Law". The genesis of this article was an unusual one, and the manner of its adoption left an impression upon the subsequent interpretation of the new provision. According to Dr. Preuss, the draftsman of the new German constitution, what was intended was to bring the German conception of international law into line with the British-American rule that the law of nations is part of the law of the land. It was believed that that rule, more than anything else, was expressive of the fact that international law binds not only states, but also individuals. Article 4 was no doubt a profession of faith in the binding force of international law, and, as such, an act of considerable importance. But, under the circumstances, it was regarded by many as an undignified gesture *ad captandam benevolentiam* and as a national humiliation. A

vast literature has since grown up round the new article, some writers endeavouring to give a restrictive interpretation to the unpopular innovation. In particular it was pointed out that the wish to assimilate the German law in this respect to the English rule was curiously misplaced seeing that that classical rule has been abandoned in the country of its origin, and that an Act of Parliament is necessary in Great Britain for any alteration of municipal law so far as private rights are affected by an international convention.

Dr. Walz's book is one of the numerous publications on the subject. How far and under what conditions may the national legislature change such rules of municipal law as are relevant from the point of view of international law? This is the question which the author sets himself to answer. Notwithstanding the title, the inquiry is in fact restricted to German and Austrian law. The pages dealing with English law are a rather superficial repetition of the presentation of the subject by Triepel some thirty years ago. It is perhaps not sufficiently known in Germany that Triepel did not take into account either the relation between the Executive and the Parliament in the matter of the conclusion of treaties, or the fact that an enabling Act in Great Britain (when that is necessary) partakes actually, although not formally, of the character of ratification. But Dr. Walz's discussion of German law, which makes up the bulk of the book, is interesting and, so far as we can judge, on the whole correct. He arrives at the conclusion that, in consequence of Article 4, any law in derogation of rules of international law, both customary *and* conventional, must be enacted by a majority required for other changes in the constitution.

The book has no index and no table of contents; and the author could have done better than devote to German law a chapter of a hundred pages without a single subdivision or explanatory title. Perhaps this is also a point for the consideration of the editors of this useful series (*Völkerrechtsfragen*, edited by Professors Pohl and Wenzel).
H. L.

Die Völkerbundssatzung. Gemeinverständlich erläutert unter Berücksichtigung des Paktes von Locarno, des Berliner Vertrages mit Sowjet-Russland, usw. By Hans Wehberg. Berlin, 1926. Hensel & Co. 145 S. (Preis kartoniert 3 Mk.)

Dr. Wehberg published this short commentary on the text of the Covenant in August, 1926, just before the entry of Germany into the League, with a view to the instruction of German public opinion as to the leading principles of the League. The work is intended for the general reader rather than for the professional jurist; it fulfils admirably the intention of the author. It is a good deal more than an ephemeral pamphlet; it tells an educated man who is not a lawyer the greater part of what he ought to know about the League; for the lawyer it might be recommended as useful preliminary reading before going on to the commentary of established reputation in which Herr Wehberg and Professor Schücking have collaborated. The hundred odd pages of commentary on the text are preceded by a useful introduction of about twenty pages dealing with the origin, the legal character and the duties of the League. There is a good index, but the bibliography is confined to German works. The book, as its title indicates, compares the Locarno Treaties with the Covenant and discusses, but less fully, the difficult question of the relation of the Covenant to the Russo-German treaty; indeed on this latter point the promise of the title is not wholly fulfilled.

The text of the Covenant appears to be taken from the German official version of the Treaty of Versailles and therefore represents the French text. This is perhaps inevitable, but a little unfortunate, as Dr. Wehberg himself remarks that a British-American text was the foundation of the Covenant and where there are differences between the English and French texts, the former is as a rule to be preferred. Thus in the Preamble to the Covenant, where the English text speaks of "obligations not to resort to war", the German version, following the French text "*certaines obligations de ne pas recourir à la guerre*", speaks of "bestimmte Verpflichtungen", and Herr Wehberg's note insists on the implied limitation.

The notes to the text, so far as our experience goes, are written with the knowledge, sympathy, and, above all, the fairness which was to be expected from the distinguished author. In particular, care seems always to have been taken (as, for example, in the note on Article 19—revision of treaties) to indicate whether the view submitted is generally received or is the subject of a conflict of opinion.

J. F. W.

The Interpretation of Treaties. Tsune-Chi Yü, Sc.D., Ph.D. Columbia University Press. pp. 288. (\$4.00.)

The general thesis of this book is that treaties should not be construed according to any definite and recognized rules of construction, such for instance as those contained in the seventeenth chapter of Vattel's second book, but that in cases where the meaning of the provision is doubtful the real intention of the parties is to be ascertained by reference to any extraneous evidence which may be available. The book is really a development of the ideas embodied in Professor Hyde's *International Law*, Vol. II, pp. 61-72, but the author goes a great deal further than Professor Hyde. In the first place he seems to attribute the existence of any rules of interpretation at all to the Machiavellian spirit of European diplomacy; his view on this point is summarized in the following passage from the Preface, which also illustrates the difficulty which sometimes arises in following the author's argument; for though his command of English is remarkable his style is occasionally somewhat obscure.

"Similarly, in the contractual stipulations between states, words and sentences are often used in a sense other than and extrinsic to the ordinary descriptions imputed by dictionaries and grammars. What is more, the moral technique of old European diplomacy, with its jungle of finesse and obliquities, often ascribes so much 'neo-Latin calculation' that even the most experienced negotiators of international agreements must needs be mindful of the seriousness of Bismarck's cynical remark that he always told the truth because none believed it. Such being the case, international ills—wars and injustices—frequently become an inevitable harvest of the crop of treaty contentions: and diplomats are at times coerced into the intricacies and intrigues of treaty-making, as well as treaty-interpreting, by virtue of the sheer prevalence of dogmatic rules from the books of bygone publicists and on account of the lack of scientific search for the true principles of interpretation.

"This study, therefore, is undertaken with the hope and aspiration of approaching the problem of treaty interpretation along the scientific road such as that paved by the new school of interpretation—free from the 'primitive formalism'".

In the second place the author's view appears to be that the limitations of language will never allow the intention of the contracting parties to be clearly expressed on the face of the document, and that therefore extraneous evidence is always admissible, not merely to clear up obscurities, but also to show that a provision as to whose meaning no doubt at all can exist was really intended to mean something quite different, or even to mean nothing at all. For instance, he argues in favour of the contention put forward by the American Agent in the case of the Cayuga Indians in the recent Anglo-American Pecuniary Claims Arbitration, that Article 9 of the Treaty of Ghent was merely inserted "to save the face of the negotiators" and was not intended to have any effect at all. And the author entirely rejects Vattel's "First General Maxim of Interpretation" that "it is not allowable to interpret what has no need of interpretation".

It would probably be generally admitted that the part which definite rules of construction can play in the interpretation of treaties is limited, and international tribunals not infrequently admit extraneous evidence, sometimes to an extent which is disturbing to English lawyers. But the majority at any rate of Vattel's more important principles of construction are little more than rules of common sense which any tribunal is almost bound to apply to the interpretation of a disputed provision, and Dr. Yü might well reflect whether the "golden chances to marshal phrases and clauses, and to manipulate terms and terminologies with cool, cunning skill fortified by a few foreseen defensive weapons of dubious connotations" which, in his opinion, are afforded to diplomats by the existence of rules of construction (though it is obvious to any reader of Vattel's remarks on the point that the main object of his rules of construction was to render such chicanery impossible) would not be afforded in an even greater measure by a system which would deprive international tribunals of any rules of construction at all and permit any party to introduce extraneous evidence of any description, not only for the purpose of interpreting obscure passages, but also in order to introduce obscurity where, on the text of the treaty, no doubt as to its meaning exists. Such a method at any rate hardly seems to deserve the description "scientific" which the author repeatedly applies to it.

The book is illustrated by references to a good many arbitral decisions, and the tables of authorities and decided cases are very full and useful. Whatever one may think of the author's conclusions, there can be no two opinions as to his industry and ability.

W.

Les Gouvernements de fait devant le juge. By Noël Henry, with a preface by Professor Basdevant. Paris: Librairie R. Guillon, xxxii and 260 pp. (frs. 60).

This is a scholarly treatise on *de facto* governments. It deals with the capacity of such governments, and the circumstances in which the state is responsible for their acts. The subject is pursued in all its ramifications and consequently it covers from a somewhat unusual angle a section of the field of international law which is apt to receive rather cursory treatment at the hands of publicists. Usually the subject is dealt with only from the point of view of the rules which states should follow in dealing with governments brought into power by a rebellion. Mr. Noël Henry starts from a different point altogether. It is in the courts that there have to be solved the problems affecting private persons to which the acts of *de facto* governments give rise, and the author puts himself

into the position of the judge and deals with his subject from the point of view of the principles which the judge must apply.

This is a very practical line to take. Every *de facto* government is engaged in governing some populated area : so long as it maintains itself in power, such a government will be making contracts, levying taxes, passing laws ; the courts will be administering justice in its name, marriages will be solemnized before its officials, &c. To what extent and in what conditions will all these governmental acts be entitled to recognition in foreign countries, or in the country itself after a change of régime ? It is not in the Foreign Office that these questions will come up for settlement, it is in the courts of justice or before international tribunals.

The book is divided into three sections. The first deals with the rules applicable where a national court of justice is called on to pronounce on the validity of some act or proceeding of a government which never obtained recognition as the government of the country. The second deals with the rules which a court must follow when dealing with the acts of a *de facto* government in a foreign state. The third deals with the subject from the point of view of an international tribunal.

As the author shows, the principles applicable in each case vary largely. Judges have not always distinguished them, and consequently some of the decisions which have been given in recent years are not altogether satisfactory.

The material on which the book is based consists chiefly of the decisions given in municipal courts and by international tribunals. Of these full use is made, and it is interesting to find how copious the jurisprudence is, when the British, French, and American decisions are all collected, as well as those of other countries.

There is an excellent chapter on the general subject of recognition of states and governments ; the author traces with lucidity the origin and the reason of the rule that where the validity of the act of a government in a foreign country comes in question, the courts must base their decision on whether the executive authority of their own country has or has not recognized that government. It is interesting to note that Mr. Noël Henry expresses doubt whether the English and American courts have been right in attributing retroactive effect to recognition accorded to a foreign government by the government of their own country, so that the government is recognized as possessing sovereign authority from the moment when it came into power and not from the moment of the recognition.

Altogether this will be a most useful contribution to the literature of international law, and its author is to be congratulated.

C.

BIBLIOGRAPHY

(1927)

Agrarian Reforms.

RUMER, W. : Die Agrarreformen der Donau-Staaten. 1927. Innsbruck : Selbstverlag. 8vo. 170 pp.

Air Law.

DÖRING, H. : Das internationale Recht der Privatluftfahrt. 1927. Berlin : Gebr. Radetzki. 8vo. 58 pp.

GIANNINI, A. : La Convenzione ibero-americana per la navigazione aerea. 1927. Roma : U.S.I.L.A. 8vo. 39 pp.

HACKWITZ, G. von : Die Neutralität im Luftkriegsrecht. 1927. Stuttgart : F. Enke. La. 8vo. 111 pp. M. 7.70.

SCHREIBER, O. : Die moderne Entwicklung des Luftfahrtrechts. (Weltwirtschaftliches Archiv, Jan., 1927.)

VISSCHER, F. de : Le Droit international de la navigation aérienne en temps de paix. (Revue de droit international, 1927, No. 3.)

Arbitration.

DOKA, K. : Schweizerische Schiedsgerichtspolitik. (Zeitschrift für öffentliches Recht, Bd. VII, i. 1927.)

HILL, D. J. : The Problem of a World Court : the Story of an unrealized American Idea. 1927. London : Longmans. 8vo. 230 pp. 7s. 6d.

KAUFMANN, P. : Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Krieg, besonders durch den Locarno-Pakt. 1927. Leipzig : R. Noske. 8vo. 77 pp. M. 5.

THIEME, H. W. : Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg. 1927. Leipzig : R. Noske. 8vo. 85 pp. M. 5.

WITENBERG, J. C. : Étude sur la compétence des tribunaux arbitraux mixtes concernant les dommages de guerre. 1927. Paris : Recueil Sirey. 8vo. 63 pp.

Armaments.

BAKER, P. J. N. : Disarmament and the Coolidge Conference. 1927. London : Hogarth Press. Cr. 8vo. 53 pp. 2s.

BLISS, T. H. : Disarmament. (American Journal of International Law, Jan., 1927.) General Survey of the disarmament problem. (European Economic and Political Survey, April 30, 1927.) [Text of principal documents and a bibliography.]

KUNZ, J. L. : Gaskrieg und Völkerrecht. 1927. Wien : J. Springer. La. 8vo. 83 pp. M. 4.80.

Baltic.

GRETOR, G. : Die Zufahrt zur Ostsee und Dänemarks Neutralität. (Europäische Gespräche, Nov., 1927.)

Bessarabia.

BEVIONE, G. : La ratifica della Bessarabia. (Gerarchia, Marzo, 1927.)

BOLDUR, A. : La Bessarabie et les relations russo-roumaines. (La question bessarabienne et le droit international.) 1927. Paris : J. Gamber. 8vo. 410 pp.

British Empire.

JOHNSTON, V. K. : Dominion Status in International Law. (American Journal of International Law, July, 1927.)

Canada.

TURGEON, W. F. A. : L'autonomie du Canada et sa situation internationale. 1927. Paris : Société de l'Histoire du Canada, 52, rue de Richelieu (1^{er}). 8vo. 27 pp. 5 frs.

China.

WILLOUGHBY, W. W. : Foreign Rights and Interests in China. 1927. Revised and enlarged ed. Baltimore : Johns Hopkins Press. 2 vols. 8vo.

Claims.

BURCHARD, A. : The Mixed Claims Commission and German Property in the United States. (American Journal of International Law, July, 1927.)

WITTENBERG, J. C. : Commissions mixtes de réclamations germano-américaines. 1927. Paris : Presses Universitaires. 2 t. 8vo.

Codification.

REEVES, J. F. : Progress of the work of the League of Nations Codification Committee. (American Journal of International Law, Oct., 1927.)

SCOTT, J. B. : The Gradual and Progressive Codification of International Law. (American Journal of International Law, July, 1927.)

VISSCHER, C. de : La Codification du droit international. (*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. I. 1927.)

Communications.

DOKA, K. : Der Bodensee im internationalen Recht. Das Recht der internationalen Binnenseen. 1927. Frauenfeld : Huber et Cie. La. 8vo. 125 pp. 6 frs. (Swiss.)

Consuls.

STEWART, I. : Consular Privileges and Immunities under the Treaties of Friendship, Commerce and Consular Rights. (American Journal of International Law, July, 1927.)

Criminal Law.

SALDAÑA, Q. : La Justice pénale internationale. (*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 5. 1927.)

Extradition.

KRAUS, H. : Observations concernant les tendances de l'évolution du droit international de l'extradition. (Revue de Droit International, No. 3, 1927.)

MUDDIMAN, A. : The Law of Extradition from and to British India. 1927. London : Thacker, Spink. Second ed. 8vo. 17s. 6d.

Extra-Territoriality.

HEYKING, A. de : L'Exterritorialité et ses applications en Extrême-Orient. (*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 2. 1927.)

LA TERZA, P. : L'Abolizione della giurisdizione consolare nel Siam. (Rivista di Diritto Internazionale, fasc. 2. 1927.)

YOSHITOMI, M. : Les Zones exterritoriales en Chine au point de vue de droit international. (Extrait de la Revue générale de droit international privé.) 1927. Paris : A. Pédone. 8vo. 30 pp.

Frontiers.

ADAMI, V. : National Frontiers in relation to International Law. Tr. T. T. Behrens. 1927. London : Oxford University Press. 8vo. 10s. 6d.

International Law.

BAAK, J. C. : Das völkerrechtliche Problem des Angriffes. Zeitschrift für Oeffentliches Recht. Bd. 6. III. 1927.

BENOIST, C. : L'Influence des idées de Machiavel. (*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 4. 1927.)

BIRKENHEAD, F. E. S., First Earl of : International Law. 6th ed. Ed. R. Moelwyn-Hughes. 1927. London : Dent. La. 8vo. 486 pp. 21s.

- BOEGNER, M. : L'Influence de la réforme sur le développement du droit international. (*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 1. 1927.)
- DIMITRIU, J. T. N. : Le Régime des biens d'État cédés en vertu des anciens et des nouveaux traités. 1927. Paris : A. Pédone. 8vo. 128 pp.
- GIDEL, G. : Droit et devoirs des nations. (*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 5. 1927.)
- GOYAU, G. : L'Église catholique et le droit des gens. (*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 1. 1927.)
- GREY, F. T. : Des Eaux territoriales. (*Revue de Droit International*, Nos. 1-2, 1927.)
- GROTIUS SOCIETY : Selections from the second edition of the *Abrégé du Projet de Paix Perpétuelle*, by C. I. Castel de Saint-Pierre. Tr. by H. H. Bellot, with introduction by P. Collinet. [Texts for students of international relations, No. 5.] 1927. London : Sweet & Maxwell. 8vo. 61 pp. 2s. 6d.
- Kant's Perpetual Peace. Tr. by H. O'Brien, with introduction by J. H. Buckland. [Texts for students of international relations, No. 7.] 1927. London : Sweet & Maxwell. 8vo. 59 pp. 2s. 6d.
- HEILBORN, P. : Deliktsschuld und Erfolgshaftung im Völkerrecht. (*Zeitschrift für Öffentliches Recht*. Bd. 7, I. 1927.)
- HELD, H. J. : Chronik des Völkerrechts für die Jahre 1925 und 1926. (*Weltwirtschaftliches Archiv*, Juli 1927.)
- HERSHEY, A. S. : The Essentials of International Public Law and Organization. Rev. ed. 1927. New York : Macmillan. 8vo. 806 pp. \$4.75.
- INTERNATIONAL LAW ASSOCIATION : Report of the thirty-fourth Conference, held at Vienna, August 5th to August 11th, 1926. 1927. London : Sweet & Maxwell. 8vo. cxcix, 742 pp. Price to non-members, £2.
- KUHN, A. K. : Les Effets de commerce en droit international. [*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 3. 1927.]
- KUNZ, J. L. : Zum Begriff der "nation civilisée" im modernen Völkerrecht. (*Zeitschrift für Öffentliches Recht*. Bd. 7, I. 1927.)
- LAPRADELLE, A. de : Les nouvelles tendances de droit international. (*L'Esprit International*, Juillet 1927.)
- LAUTERPACHT, H. : Private Law Sources and Analogies of International Law (with special reference to International Arbitration). 1927. London : Longmans Green. 8vo. 352 pp. 25s.
- LEWALD, H. : Questions de droit international des successions. [*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 4. 1927.]
- LÜTTGER, H. : Die Lehre von den Grundrechten und Grundpflichten der Staaten im Völkerrecht. (*Zeitschrift für Öffentliches Recht*. Bd. 6, 2. 1927.)
- MEIER, B. : Der Staatsangehörige und seine Rechte, insbesondere seine Vermögensrechte, im System des Völkerrechts. 1927. Jena : G. Fischer. La. 8vo. xvi, 160 pp. M. 8.
- MERCKER, R. : Die Küstengewässer im Völkerrecht. 1927. Stuttgart : F. Encke. 4to. M. 7.70.
- MICELI, V. : Il Problema del riconoscimento nel diritto internazionale. (*Rivista di Diritto Internazionale*, fasc. 2. 1927.)
- MORELLI, G. : Circa l'indagine sulla competenza del magistro straniero nei giudizi di delibazione. (*Rivista di Diritto Internazionale*, fasc. 1. 1927.)
- PHILLIMORE, G. G. : Immunité des états au point de vue de la juridiction ou de l'exécution forcée. [*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 3. 1927.]
- STRUPP, K. : L'intervention en matière financière. [*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 3. 1927.]
- Die völkerrechtliche Haftung des Staates, insbesondere bei Handlungen Privater. 1927. Kiel : Institut für Internationales Recht. 8vo. 36 pp. M. 3.
- Wörterbuch des Völkerrechts und der Diplomatie. 17. und 18. Lieferung. 1927. Berlin : W. de Gruyter. La. 8vo.
- VERDROSS, A. : Das Völkerrecht im Systeme von Spinoza. (*Zeitschrift für Öffentliches Recht*. Bd. 7. I. 1927.)

- VISSCHER, C. de : Notes sur la responsabilité internationale des États et la protection diplomatique d'après quelques documents récents. (*Revue de Droit International*, No. 3. 1927.)
- VLUGT, W. van der : L'œuvre de Grotius et son influence sur le développement du droit international. (*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 2. 1927.)
- WALZ, G. A. : Die Abänderung des völkerrechtsgemässen Landesrechts. Untersuchungen zum englischen, amerikanischen, deutschen und österreichischen Recht. 1927. Berlin : F. Dümmler. 8vo. 174 pp. M. 6.75.

League of Nations.

- ALVAREZ, A. : Les Groupements continentaux et la réforme du Conseil de la Société des Nations. (*L'Esprit International*, 1927.)
- OTTLIK, G. : Annuaire de la Société des Nations, 1920-7. 1927. Genève : Payot. Sm. 8vo. 1005 pp.
- PETRASCU, N. N. : Les Mesures de contrainte internationale qui ne sont pas la guerre entre États Membres de la Société des Nations. 1927. Paris : A. Pédone. 8vo. 211 pp.

Mandates.

- BUZA, L. : Die rechtliche Natur der Mandate des Völkerbundes. (*Zeitschrift für Öffentliches Recht*. Bd. 6, 2. 1927.)
- VAN REES, D. F. W. : Les Mandats internationaux. Le contrôle international de l'administration mandataire. 1927. Paris : Rousseau. 8vo. 146 pp.
- WEHBERG, H. : Die Pflichten der Mandatarmächte betreffend die deutschen Schutzgebietsanleihen. (*Weltwirtschaftliches Archiv*. Jan., 1927.)

Maritime Law.

- FEDOZZI, P. : La Condition juridique des navires de commerce. (*In* Hague : Académie de Droit International. Recueil des Cours, 1925. t. 5. 1927.)
- HOSTIE, J. : Le Domaine maritime. (*Revue de Droit International*, No. 1-3. 1927.)
- TAFEL, W. : Das internationale Recht der Nordsee. (*Niemeyers Zeitschrift*. Bd. xxxvii. H. 2.5. 1927.)

Minorities.

- BRUNET, R., & LOEWENFELD, E. : De la protection des minorités par la Société des Nations. Mémoire. 1927. Paris : E. Desfossés. 8vo. 15 pp.
- BUDISTEANU, R. : La Condition juridique des minorités ethniques selon les derniers traités de paix ; le problème au point de vue roumain. 1927. Paris : R. Pichon. 8vo. 52 pp. 5 fr.
- KRAUS, H. : Das Recht der Minderheiten. Materialien zur Einführung in das Verständnis des modernen Minoritäten-Problems. 1927. Berlin : G. Stilke. Sm. 8vo. 365 pp.

Nationality.

- BALDASSARI, A. : Gli Effetti della naturalizzazione straniera del cittadino, rispetto al ordinamento giuridico italiano. (*Rivista di Diritto Internazionale*, fasc. 4. 1927.)
- CLEVELAND, F. A. : American Citizenship, as distinguished from Alien Status. 1927. New York : Ronald Press. 8vo. 482 pp. \$4.
- Franzosen und Italiener in Tunis. (*Europäische Gespräche*, Okt. 1927.) [In part a review of Bernard's "L'Afrique du Nord pendant la Guerre", but deals with nationality question.]
- GETTYS, F. L. : The Effect of Changes of Sovereignty on Nationality. (*American Journal of International Law*. April, 1927.)
- MARBURG, E. : Staatsangehörigkeit und feindlicher Charakter juristischer Personen, unter besonderer Berücksichtigung der Rechtsprechung der Gemischten Schiedsgerichte. 1927. Berlin : F. Vahlen. La. 8vo. 115 pp. M. 6.
- VALERY, J. : La Nationalité française. Commentaire de la loi du 10 août 1927. 1927. Paris : R. Pichon. 8vo. 88 pp.

Neutrality.

- GRAHAM, M. W., Jr. : Neutralization as a Movement in International Law. (American Journal of International Law, Jan., 1927.)
- HILL, N. L. : Recent Development in the Law of Unneutral Service. (American Journal of International Law, July, 1927.)
- VANDENBOSCH, A. : The Neutrality of the Netherlands during the World War. 1927. Grand Rapids : W. B. Eerdmans Publishing Company. 8vo. 349 pp. \$4.

Passports.

- GARGAS, S. : Das internationale Passproblem. 1927. Haag : Belinfante. La. 8vo. 81 pp. Fl. 2.

Permanent Court.

- FARAG, W. M. : L'intervention devant la Cour Permanente de Justice Internationale. 1927. Paris : R. Pichon. 8vo. 144 pp. 15 fr.
- HAMMARSKJÖLD, A. : Le Règlement révisé de la Cour. (Revue de Droit International, Nos. 4-5, 1927.)
- HUDSON, M. O. : Les Avis consultatifs de la Cour. (In Hague : Académie de Droit International. Recueil des Cours, 1925. t. 3. 1927.)
- TÉNÉKIDES, G. : La compétence de la Cour Permanente de Justice Internationale en matière de procédure consultative. 1927. Paris : A. Pédone. 8vo. 12 pp.
- WEHBERG, H. : Die fakultative Klausel zum Statut des Weltgerichtshofes. (Völkerbundfragen, Okt. 1927.)
- WRIGHT, Q. : The United States and the Permanent Court. (American Journal of International Law, Jan., 1927.)

Prize Law.

- GARNER, J. W. : Prize Law during the World War. 1927. London : Macmillan. 8vo. 25s.

Rumania.

- DUGUIT, L. : Le Différend roumano-hongrois et le Conseil de la Société des Nations. (Revue de Droit International, No. 4-5, 1927.)
- DUPUIS, C. : Les Arrêts de compétence du tribunal arbitral mixte roumano-hongrois. (Revue de Droit International, No. 1-2, 1927.)
- ROLIN, A. : Les Réformes agraires en Roumanie et la compétence des tribunaux arbitraux mixtes. (Revue de Droit International, No. 4-5, 1927.)

Scheldt.

- GEORGE, R. H. : The Scheldt Dispute. (Foreign Affairs, Oct., 1927.)

Sovereignty.

- HELLER, H. : Die Souveränität. 1927. Berlin : W. de Gruyter. La. 8vo. 177 pp. M. 8.50.
- POLITIS, N. : Le Problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux. (In Hague : Académie de Droit International. Recueil des Cours, 1925. t. 1. 1927.)
- SUKIENNICKI, W. : La Souveraineté des états en droit international. 1927. Paris : A. Pédone. 8vo. 423 pp.

Tangier.

- FITZGERALD, R. G. : L'Organisation judiciaire de Tanger sous le régime international. 1927. Paris : A. Pédone. 8vo. 28 pp.
- HUDSON, M. O. : The International Mixed Court of Tangier. (American Journal of International Law, April, 1927.)

Treaties.

- DJERMANOVITCH, R. : Le Traité de Versailles et les matières premières. 1927. Paris. 8vo. 175 pp.
- Erklärung der Peking Regierung zur Beendigung des chinesisch-belgischen Vertrages von 1865. (Europäische Gespräche, Juli 1927.)

Friedensverträge, Völkerbundsdokumente, Vergleichs-, Schieds- und Sicherheitsverträge, Allianzverträge, 1919–26. Hrsg. von Th. Niemeyer. [Jahrbuch des Völkerrechts, Bd. 9 (Sonderband).] Institut für Internationales Recht an der Universität Kiel. M. 30.

GLASGOW, G.: Foreign Affairs: Scandinavian Treaties of Conciliation. (Contemporary Review, Sept., 1927.)

GRAUX, L.: Histoire des violations du traité de paix. T. 4. (1923–6.) 1927. Paris: Champion. 8vo.

HEADLAM-MORLEY, J. W.: Treaties of Guarantee. Repr. from the Cambridge Historical Journal, Vol. II, No. 2, 1927. Cambridge: Cambridge University Press. 8vo. 151–70 pp.

KOENIG, K.: Volksbefragung und Registrierung beim Völkerbund: neue Erfordernisse für die Gültigkeit von Staatsverträgen 1927. Leipzig: R. Noske. 8vo. vii, 77 pp. M. 5.

LEWENHAUPT, le comte Sten, ed.: Recueil des traités, conventions et autres actes diplomatiques de la Suède entièrement ou partiellement en vigueur au 1^{er} janvier 1926. 1927. Stockholm: P. A. Norstedt. La. 8vo. T. 2. xxviii, 962 pp.

RASMUSSEN, G.: L'accord dano-norvégien sur le Groenland oriental et son historique. (Revue de Droit International, Nos. 4–5, 1927.)

Yü, T.-C.: The Interpretation of Treaties. 1927. (London: P. S. King.) New York: Columbia University Press. 8vo. 288 pp. (13 pp. bibl.). \$4.

War.

Völkerrecht im Weltkrieg (1914–18). [Das Werk des Untersuchungsausschusses. 1919–28. Reihe 3.] 1927. Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte. 4 Bde in 5. La. 8vo.

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- Inland Navigation. Measurement of vessels employed in inland navigation. Convention, with protocol of signature. Paris, November 27, 1925. (*Treaty Series No. 26, 1927.*) [Cmd. 2952.] 3d. (3½d.)
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- Italy. See Abyssinia.
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- Latvia. Nationality law of Latvia, June 2, 1927. (*Miscellaneous No. 8, 1927.*) [Cmd. 2970.] 2d. (2½d.)
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- Forty-fourth Session of the Council. Report by the Rt. Hon. Sir Austen Chamberlain, K.G., M.P., British delegate. (*Miscellaneous No. 6, 1927.*) [Cmd. 2894.] 3d. (3½d.)
- Forty-fifth Session of the Council. Report by the Rt. Hon. Sir Austen Chamberlain, K.G., M.P., British delegate. (*Miscellaneous No. 7, 1927.*) [Cmd. 2925.] 6d. (7d.)
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- Lithuania. Treaty between the United Kingdom and Lithuania for the extradition of fugitive criminals. Signed at Kaunas (Kovno), May 18, 1926. (*Treaty Series No. 15, 1927.*) [Cmd. 2897.] 2d. (2½d.)
- Mexico. Convention between His Majesty and the President of the United Mexican States for the settlement of British pecuniary claims in Mexico arising from loss or damage from revolutionary acts between November 20, 1910, and May 31, 1920. Signed at Mexico November 19, 1926. (*Mexico No. 1, 1927.*) [Cmd. 2876.] 3d. (3½d.)
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- New Hebrides. Notes exchanged between the United Kingdom and France regarding certain amendments to be made to the New Hebrides Protocol of August 6, 1914. Paris, February 17–21, 1927. (*Treaty Series No. 8, 1927.*) [Cmd. 2829.] 1d. (1½d.)
- Notes exchanged between His Majesty’s Government in Great Britain and the French Government confirming the agreement of August 18, 1927, regarding the administration of the New Hebrides. Paris, August 31, 1927. (*Treaty Series No. 28, 1927.*) [Cmd. 2988.] 2d. (2½d.)

Palestine. *See* Syria.

Portugal. Agreement for the settlement of the war debt of Portugal to Great Britain. [*Cmd.* 2791.] 1d. (1½d.)

— Notes exchanged between the United Kingdom and Portugal renewing the arbitration convention between the two countries of November 16, 1914. London, 4th January, 1927. (*Treaty Series No. 5, 1927.*) [*Cmd.* 2796.] 1d. (1½d.)

Reparation. Agreement regulating the amounts to be allocated out of the annuities of the Experts' Plan for the Armies of Occupation, the Rhineland High Commission and the Military Commission of Control for the period April 1, 1926, to January 10, 1930. (*Miscellaneous No. 3, 1927.*) [*Cmd.* 2886.] 2d. (2½d.)

Ruanda-Urundi. *See* Tanganyika Territory.

Rumania. Agreement dated October 19, 1925, for the settlement of the Rumanian war debt to Great Britain. [*Cmd.* 2990.] 1d. (1½d.)

Russia. Note from His Majesty's Government to the Government of the Union of Soviet Socialist Republics respecting the relations existing between the two Governments, and Note in reply, February 23-6, 1927. (*Russia No. 1, 1927.*) [*Cmd.* 2822.] 6d. (6½d.)

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— Convention between His Britannic Majesty and His Majesty the King of Spain revising certain provisions of the Anglo-Spanish treaty of commerce and navigation of October 31, 1922. Signed at London, April 5, 1927. (*Treaty Series No. 13, 1927.*) [*Cmd.* 2855.] 3d. (3½d.)

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— *See* Hejaz.

Syria. Agreement between Palestine and Syria and the Lebanon to facilitate good neighbourly relations in connexion with frontier questions. Signed at Jerusalem, February 2, 1926. (*Treaty Series No. 19, 1927.*) [*Cmd.* 2919.] 3d. (3½d.)

Tanganyika Territory. Protocol respecting the boundary between Tanganyika Territory and the Belgian mandated territory of Ruanda-Urundi, signed at Kigoma, August 5, 1924, and notes exchanged between the British and Belgian Governments, Brussels, May 17, 1926 (with three maps). (*Treaty Series No. 6, 1927.*) [*Cmd.* 2812.] 3s. 6d. (3s. 7½d.)

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- United States. Notes exchanged between His Britannic Majesty's Government and the Government of the United States of America regarding the disposal of certain pecuniary claims arising out of the recent war. Washington, May 19, 1927. (*Treaty Series No. 14, 1927.*) [*Cmd. 2877.*] 2d. (2½d.)
- Yugoslavia. Agreement for the settlement of the Serb-Croat-Slovene war debt to Great Britain, [*Cmd. 2973.*] 1d. (1½d.)

SUMMARY OF EVENTS¹

for the year 1927

COMPILED BY THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS.

Abbreviations.

A.J.I.L., *American Journal of International Law*. *Cmd.*, Great Britain, Parliamentary Papers. *E.N.*, *L'Europe Nouvelle*. *F.F.*, *Feuille Fédérale* (Swiss). *L.N.O.J.*, *League of Nations Official Journal*. *L.N.T.S.*, *League of Nations Treaty Series*. *T.*, *The Times* (London).

Afghanistan.

1927. April 10. Ratifications exchanged at Kabul of Treaty of Friendship with Russia signed at Pagnan on Aug. 31, 1926.

Nov. 3. Treaties of Friendship signed (a) with Turkey at Angora ; (b) Nov. 5, with Poland at Angora ; (c) Dec. 2, with Persia at Kabul.

Albania.

1927. Jan. 24. Ratifications exchanged of Italo-Albanian Pact signed at Tirana on Nov. 27, 1926. Feb. 8, Treaty registered with League of Nations.

Mar. 19. Italian Government notified British, French, and German Governments that it had received information of preparations in Jugoslavia for incursion into Albania with object of overthrowing Government. M. Peric, Yugoslav Foreign Minister, announced that Yugoslav Government was willing to accept an international inquiry by military experts on the question of preparations against Albania. March 22, M. Peric substituted for original offer proposal of inquiry on both sides of frontier by League of Nations. April 1, Yugoslav Government signified that it was ready to enter into direct negotiations with Italy. April 12, semi-official statement issued at Belgrade that Yugoslav, Italian, and Albanian Governments had agreed that British, French, and German delegates would visit frontier if any fresh incidents should occur during Italo-Yugoslav negotiations, which were expected to begin shortly. April 14, official note issued at Rome stating that Treaty of Tirana would not be discussed in negotiations with Jugoslavia.

April 25. Declaration exchanged with Italy in Rome that neither party should, without prior consultation with the other, enter into negotiations regarding the interpretation or application of Treaty of Tirana.

May 27. Albanian police arrested on charge of espionage, M. Juraskovic, employed as dragoman at Yugoslav Legation in Tirana. May 30, Yugoslav Legation protested and demanded release of M. Juraskovic. June 1, Albanian Government offered to release M. Juraskovic if certain terms of note of May 30, to which objection was taken, were modified. June 3, Yugoslav chargé d'affaires threatened to close Legation unless M. Juraskovic were released immediately. June 4, Yugoslav chargé d'affaires and staff left Tirana. June 6, Albanian Government informed League Secretariat of rupture and circumstances leading up to it. June 12, Yugoslav Government communicated their version of incident to League and placed themselves at disposal of Council in event of incident being considered sufficiently serious, in connexion with other circumstances, to warrant examination of whole problem. June 16, Albanian Minister to Jugoslavia left Belgrade. June 23, representatives of Great Britain, France, and Italy presented identic note to Albania and to Jugoslavia suggesting basis for settlement. July 3, settlement reached on lines suggested by Powers ; new Yugoslav note substituted for that of May 30 and M. Juraskovic released.

¹ The information given has been collected from newspapers and other sources, and it has not been possible in every case to test its accuracy. References in brackets indicate where texts are to be found.

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Oct. 14. Tsena Bey Kryeziu, Albanian Minister to Yugoslavia and Czechoslovakia, assassinated at Prague.

November 22. Treaty of Defensive Alliance with Italy signed at Tirana (text : *Europ. Econ. & Polit. Survey*, 30.11.27 ; *E.N.*, 10.12.27).

Arabia.

1927. May 20. Treaty of friendship and good understanding, superseding treaty of Dec. 26, 1915, signed at Jiddah by Sir Gilbert Clayton on behalf of Great Britain and by Amir Faysal on behalf of Ibn Saud. Notes exchanged May 19-21 regarding frontier between Hijaz and Transjordan, British right of manumitting slaves, removal of embargo on export of arms to Arabia, &c. Ratifications exchanged on Sept. 17, 1927. (Texts : *Cmd.*, 2951 ; of treaty only, *T.* 24.9.27.) Nov. 22, Persia protested against treaty.

Austria.

1927. Feb. 15. Air convention with Czechoslovakia concluded at Vienna.

Feb. 5. Two legal conventions with Germany signed at Vienna. Aug. 23, ratifications exchanged at Berlin. Oct. 23, came into force.

March 11. Protocols regulating legal questions arising out of delimitation of frontier with Hungary signed at Vienna.

March 20. Ratifications exchanged of treaty of conciliation and arbitration with Sweden of May 28, 1926.

April 2. Ratifications exchanged at Warsaw of treaty with Poland of April 16, 1926, regarding legal disputes. May 2, came into force.

July 15. Serious rioting in Vienna following acquittal on July 14 of Fascists charged with killing a Socialist workman and child on Jan. 30, 1927. Vienna Law Courts attacked and burned by rioters ; general strike proclaimed. July 16, rioting subsided. July 18-19, strike ended at midnight.

July 29. Vienna Municipal Council issued ordinance providing for permanent establishment of armed municipal police force created during recent rioting ; Liquidation Commission responsible for winding up military control in Austria informed Government that creation of proposed force contravened terms of Treaty of St. Germain. Aug. 5, Mayor of Vienna notified Government that force would be disbanded as from Aug. 18, and replaced by a " watchman service " for municipal buildings.

Oct. 27. Protocol with Conference of Ambassadors signed in Paris relating to air régime in Austria.

Dec. 2. Conference of Ambassadors decided that Liquidation Commission should cease to function on Jan. 31, 1928.

Belgium.

1927. Feb. 5. Treaty of arbitration and conciliation with Switzerland signed in Brussels. Nov. 12, ratifications exchanged.

March 4. Treaty of arbitration and conciliation with Finland signed.

March 24. Treaty of April 3, 1925, with Netherlands regarding Scheldt rejected by Netherlands First Chamber.

July 9. Treaty of conciliation and arbitration with Portugal signed in Brussels.

July 9. Financial agreement with Germany signed at Aix-la-Chapelle. Aug. 1, came into force.

July 19. Treaty of conciliation, arbitration and judicial settlement with Spain signed in Brussels.

July 19-22. Conventions with Portugal regarding Belgian Congo and Angola signed at São Paulo de Loanda : (1) convention regulating questions regarding road construction, arms, contraband and certain economic matters, signed on July 20 ; (2) frontier convention, providing for an exchange of territories, signed on July 22.

Sept. 27. Ratifications exchanged of arbitration and conciliation treaty with Sweden of April 30, 1926.

Oct. 6. Establishment convention with France signed in Paris. Oct. 27, ratifications exchanged. Nov. 6, came into force.

Oct. 18. Arbitration treaty with Luxembourg signed.

Oct. 22. Ratifications exchanged of air navigation convention with Germany of May 29, 1926. Came into force same day.

Bolivia.

1927. April 22. Protocol with Paraguay signed in Buenos Ayres providing for meeting between delegates of the two countries at Buenos Ayres to endeavour to settle dispute regarding ownership of Chaco territory. May 25 and 30, further exchange of notes.

Brazil.

1927. May 21. Protocol delimiting frontier with Paraguay signed at Rio de Janeiro.

July 28. Ratifications exchanged of general arbitration convention with Peru signed at Rio de Janeiro on July 11, 1918.

Bulgaria.

1927. June 17. Agreement concluded with Great Britain for provisional dissolution of Anglo-Bulgarian Mixed Arbitral Tribunal. (Text : *Cmd.* 2928.)

Aug. 9. Conference of Ambassadors informed Bulgarian Government that Military Control Commission had been withdrawn as from June 30.

Oct. 7. As result of series of outrages in Macedonia, Yugoslav Minister in Sofia asked Bulgarian Government to state if it was prepared to suppress Macedonian Revolutionary Organization. Bulgarian Government decided to take energetic measures against the Organization and to proclaim martial law in frontier districts. Oct. 10, martial law proclaimed in districts of Kustendil and Petric. Yugoslav Minister informed Bulgarian Government that Yugoslav Government considered the action taken satisfactory.

Oct. 25. Bulgarian Sobranje voted approval of action taken by Government and confirmed application of martial law.

Dec. 9. Agreement regarding financial obligations incumbent on the Bulgarian and Greek Governments as a result of the exchange of populations signed at Geneva by Bulgarian and Greek Finance Ministers and President of Mixed Emigration Commission.

Chile.

1927. Jan. 12. Peruvian Government sent note to U.S. Government rejecting proposals made by State Department for settlement of Tacna-Arica controversy with Chile.

May 28. Arbitration treaty with Spain signed.

China.

1927. Jan. 1. Mr. Eugene Chen, Foreign Minister of Nationalist Government, telegraphed to his Government denouncing proposal for levying of Washington surtaxes made in British memorandum of Dec. 18, 1926 ; Canton Government began to collect tax of 2½ per cent. on ordinary goods and 5 per cent. on luxuries. Jan. 3, Sir Francis Aglen, Inspector-General of Customs, left Peking for Shanghai and Hankow to discuss customs affairs with Southern leaders. Jan. 12, Peking authorities issued mandate for the levying of the Washington surtaxes. Jan. 20, Marshal Sun Ch'uan-fang started to levy the surtaxes at the ports under his control. Jan. 31, Sir Francis Aglen, who, in view of lack of unanimity among Powers, was unable to agree to Chinese proposal that Customs Service should collect surtaxes, and who was at the time in the Yangtse Valley, was dismissed by Peking Government. British Legation protested against Sir F. Aglen's dismissal on Feb. 2. Feb. 7, representatives of Powers at Peking made joint protest against levying of surtaxes. Feb. 11, Peking Government decided that Sir F. Aglen should be granted a year's leave with status of Inspector-General, that Mr. A. H. F. Edwards should act in his absence, and that surtaxes should not be collected by Customs Service.

Jan. 1. Nationalist Government issued mandate consolidating cities of Hankow, Wuchang and Hanyang into one city named Wuhan, to be Nationalist capital.

- Jan. 1. Mixed Court at Shanghai formally handed over to Chinese under title of Provisional Court. French Mixed Court at Shanghai handed over on Jan. 5.
- Jan. 3. British concession at Hankow attacked by mob. British marines landed and held mob in check for several hours without firing a shot. Marines withdrawn on Jan. 4, Mr. Chen having undertaken that Chinese should police concession. Mob returned and overran concession on Jan. 4 and 5. British women and children evacuated and concession left in Chinese hands. Jan. 24, British business houses reopened.
- Jan. 6-7. Chinese invaded British concession at Kiukiang; British subjects evacuated.
- Jan. 11. Belgian Consul-General molested at Hankow.
- Jan. 13. Belgian Minister at Peking agreed to reopen negotiations for new Sino-Belgian treaty, Belgian Government having suspended application to Permanent Court of International Justice in connexion with Chinese denunciation of treaty of 1865. Belgian representative stated that his Government was prepared to retrocede Belgian concession at Tientsin unconditionally. Feb. 15, Belgium formally withdrew application to Permanent Court, on ground that negotiations were in progress.
- Jan. 14. Foreign missions attacked and looted at Fuchow.
- Jan. 17-22. British Government decided to send three brigades of troops under the command of Major-Gen. John Duncan to Shanghai. Foreign Office statement of Jan. 21 explained that these precautions were being taken for the sole purpose of protecting British lives, and did not indicate any modification of H.M. Government's treaty revision policy.
- Jan. 24. Mr. Chen formally protested against dispatch of British troops to Shanghai.
- Jan. 27. First British troops arrived at Shanghai. British proposals for treaty modification communicated to Mr. Chen by Mr. O'Malley.
- Jan. 28. British proposals for treaty modification communicated to Peking Government by Sir Miles Lampson.
- Jan. 31. Peking Foreign Office protested against dispatch of Shanghai Defence Force.
- Feb. 8. British Government communicated to League of Nations statement of British policy in China.
- Feb. 17. Resolution introduced by Mr. Porter on Jan. 4, proposing independent Sino-American negotiations for treaty revision, passed House of Representatives at Washington.
- Feb. 19. Chen-O'Malley agreement regarding future of British concession at Hankow signed. Feb. 20, agreement signed providing for similar settlement at Kiukiang. (Text of agreements and appended declarations, *Cmd.* 2869.) March 2, Final agreement regarding Kiukiang concession signed. March 15, Formal rendition of concessions at Hankow and Kiukiang carried out. May 17, British diplomatic representative withdrawn from Hankow.
- Feb. 22. French Settlement at Shanghai shelled by two Chinese gunboats.
- March 1. Arrest of Mme Borodin and Soviet couriers at Pukow. July 11, Mme Borodin released.
- March 4. Retreat of Chang Tsung-ch'ang's troops from Shanghai area to Nanking began. March 7, Gen. Chiang Kai-shek at Nanchang issued manifesto against Communism. March 8, serious rioting and looting at Wuhu. March 12, Shantung troops prevented by British detachment from entering international settlement at Shanghai.
- March 22. British naval force carried out punitive expedition against pirates' headquarters at Bias Bay.
- March 23. Nanking evacuated by Northern forces and occupied by Nationalist forces under Chen Chien. Organized attacks on foreigners and foreign property took place on March 24 and 25, during which British, American, French, Italian and Japanese subjects were killed or wounded. (Papers relating to Nanking incident: *Cmd.* 2953.) April 11, consular representatives at Hankow of five Powers concerned presented identic notes to Mr. Chen demanding reparation for outrages. April 14, Mr. Chen replied in five separate notes attributing outrages to Northern troops and suggesting impartial inquiry.
- April 3. Japanese concession at Hankow attacked by mob, two Japanese and about

- twelve Chinese killed ; Japanese landed marines to hold concession by force ; anti-Japanese boycott followed.
- April 4. Sino-British negotiations began at Tientsin for modification of administration of British Concession. April 22, Joint recommendations initialled.
- April 6. Chinese authorities at Peking, with consent of representatives of Powers signatory of 1901 Protocol, raided Soviet premises in Legation Quarter adjacent to Soviet Embassy, arrested number of Chinese and Russians and seized documents. April 28, twenty of arrested Chinese, who had been condemned to death by a special court, were executed.
- May 28. Japanese Government announced decision to send two battalions to Tsingtao for defence of Japanese lives and property. May 29, Nanking authorities protested against decision. May 31, Japanese troops arrived at Tsingtao. June 1, Peking Government protested. June 3, Mr. Eugene Chen protested. June 18, Japanese representative protested to Nanking Government against preparations for anti-Japanese boycott. July 6, Japanese Government ordered advance of some 2,000 troops from Tsingtao to Tsinan. July 13, Peking Government demanded immediate withdrawal of troops. Aug. 29, Japanese Prime Minister announced that troops would shortly be withdrawn from Tsinan and Tsingtao. Troops had been withdrawn by Sept. 8.
- June 2-9. Reinforcement of foreign garrisons at Tientsin in view of Southern advance.
- June 18. New administration set up at Peking composed of adherents of Chang Tso-lin. June 19, Chang installed as Commander-in-Chief of army and navy. July 3, Chang issued manifesto stating policy of new Government.
- June 30. New tariff regulations issued by Nanking Government, enforcing what amounted to tariff autonomy as from August 1.
- July 3. Chinese Ratepayers' Association at Shanghai refused payment of increased rates, on the ground that Chinese were not represented on Municipal Council.
- July 18. Martial law proclaimed in Hankow ; Communists and Labour agitators rounded up ; Government reorganized on non-Communist basis. July 27, M. Borodin left Hankow for Chengchow, Feng Yü-hsiang's head-quarters. Aug. 11, Gen. Galen left Hankow. Aug. 11 (about), Mr. Eugene Chen resigned office as Foreign Minister and left Hankow. Sept. 7, Mr. Chen arrived in Moscow.
- Aug. 8. Negotiations for new Sino-Spanish treaty began at Peking. Nov. 12, Peking Government denounced treaty of Oct. 10, 1864. Nov. 14, Spanish reply protesting against such action dispatched. Nov. 17, further Spanish note dispatched.
- Aug. 16. British aeroplane attached to Shanghai Defence Force made forced landing outside international settlement at Shanghai and Chinese troops prevented British party from retrieving wings of aeroplane. Chinese Commissioner for Foreign Affairs having refused to grant facilities for withdrawal of wings, General Duncan, G.O.C. Shanghai Defence Force, threatened to take action unless wings were returned by 11 a.m. on Aug. 17. Chinese took no action by Aug. 17, and British troops cut loop-line connecting Shanghai-Hanchow and Shanghai-Nanking railways. Aug. 18, aeroplane wings were returned and British troops repaired railway line.
- Aug. 24. Japanese Minister at Peking informed Chang Tso-lin of his Government's requirements for fulfilment of China's promises regarding Japan's special position in Manchuria. Anti-Japanese demonstrations throughout Manchuria, culminating in disturbances at Mukden on Sept. 5. By Sept. 27 anti-Japanese agitation reported to have been suppressed. Oct. 1, Dr. C. C. Wu, Nationalist Foreign Minister, protested against Japanese "demands" in Manchuria.
- Sept. 1. Second punitive expedition against Bias Bay pirates carried out by British naval forces.
- Sept. 20-1. Disturbances at Hankow between Chinese and Japanese.
- Oct. 20. British submarine L.4 in action at Bias Bay against pirates who had seized S.S. *Irene*.
- Nov. 7. Conflict between "White" Russians and occupants of Soviet Consulate at Shanghai.
- Nov. 29. General Yang Yu-ting, Chang Tso-lin's Chief of Staff, protested in a press interview against proposed American loan to S. Manchurian Railway Co.

- Nov. 30. British steamer *Siangtan* boarded by pirates below Ichang; Captain Lalor carried off and held to ransom. Dec. 12, Captain Lalor released.
- Dec. 1. International Tariff Revaluation Commission opened proceedings at Peking.
- Dec. 11. Canton seized by Communists and by "Red Peasant Army" under Yeh Ting. Dec. 12, foreigners evacuated from suburbs. Dec. 14, city retaken by troops under command of Li Fuk-lam; large numbers of Communists and Russians (including Soviet Vice-Consul) executed.
- Dec. 13. British Treasury Minute issued announcing intention of Government to surrender to existing lot-holders leases held by Government in British concessions at Tientsin, Hankow, Kiukiang, Chinkiang, Amoy, and Canton.
- Dec. 14. Nanking Government issued order closing all Soviet consulates in its territory. Dec. 15, Nanking Government addressed a note of explanation and protest to Soviet Government.
- Dec. 16. General round-up of Communists and Russians at Hankow. Dec. 17, Note from Soviet Government protesting strongly against actions of the Nationalist Government. Dec. 20, Communists executed at Hankow and Russians expelled.

Czechoslovakia.

1927. Jan. 22. Aviation Agreement with Germany signed in Prague.
Telephonic agreements with Germany and the Netherlands concluded on Dec. 17, 1926, and on Jan. 12 and 22, 1927.
- Feb. 3. Agreement with Germany regarding frontier in the district of the river Hultschine signed at Berlin.
- April 27. Reciprocal copyright arrangement effected with United States by exchange of notes.
- May 31. Commercial treaty with Hungary signed at Prague. July 24, ratifications exchanged at Budapest. Aug. 8, treaty came into force.
- July 23. Ratifications of Air Navigation Convention with Poland of April 15, 1926, exchanged at Warsaw.
- Oct. 12. Czechoslovak-Polish Frontier Delimitation Commission held final meeting in Paris; agreements signed fixing definitive frontier.

Denmark.

1927. Jan. 29. Arbitration treaty with Estonia signed at Reval.
- March 9. Ratifications exchanged of convention with Norway of Jan. 15, 1926, for pacific settlement of disputes.
- March 15. Ratifications exchanged of renewal of 1905 arbitration convention with Great Britain of June 4, 1926. (Text: *Cmd.* 2642.)
- April 4. Ratifications exchanged of arbitration treaty with Poland of April 23, 1926. May 4, treaty came into force.
- April 5. Ratifications exchanged of workmen's compensation agreement with Great Britain of Nov. 18, 1925. (Text: *Cmd.* 2851.)
- April 9. Ratifications exchanged of treaty of arbitration and conciliation with Germany of June 2, 1926. May 9, treaty came into force.
- June 27. Ratifications exchanged of provisional air navigation agreement with the Netherlands of July 23, 1926.

Egypt.

1927. May 23. Egyptian Parliamentary Committee on Army Budget published report, recommending large increases in material and personnel of army and suppression of credits for Sirdarate. May 30, British High Commissioner, Lord Lloyd, presented note to Egyptian Prime Minister, Sarwat Pasha, suggesting that question of British co-operation in Egyptian military affairs should form the subject of an agreed settlement. June 3, Egyptian reply delivered. June 13, British note delivered asking for fuller information on ambiguous passages in Egyptian note. June 14, Egyptian reply delivered, accepting principle of close co-operation between British and Egyptian armies.
- June 29. Anglo-Turkish Mixed Arbitral Tribunal declared itself incompetent to adjudicate on claim for damages brought against British Government by ex-Khedive Abbas Hilmi.

July 4-6. King Fuad in Great Britain on state visit. During July, conversations took place between Sir A. Chamberlain and Sarwat Pasha, who accompanied King Fuad. Oct. 30-Nov. 8, conversations with Sarwat Pasha renewed in London.
 Aug. 23. Zaghlul Pasha died.

Estonia.

1927. Feb. 23. Protocol with Latvia modifying frontier agreement of Oct. 19, 1920, and supplementary convention of Nov. 1, 1923, signed at Tallinn (Reval). March 31, Protocol embodying final settlement of frontier signed at Riga.
 June 1. Ratifications exchanged of arbitration treaty with Germany of Aug. 10, 1925. July 1, treaty came into force.
 Aug. 8. Agreement with Russia regarding method of settlement of frontier disputes signed at Tallinn.

Finland.

1927. Jan. 20. Agreement with France relating to "*iudicatum solvi*" signed in Paris. Feb. 21, ratifications exchanged.
 March 15. Ratifications exchanged at Oslo of convention with Norway of Feb. 3, 1926, for pacific settlement of disputes. Came into force same day.
 Sept. 2. Exchange of notes with Russia modifying convention of June 5, 1923, regarding navigation of Finnish vessels on the Neva.
 Nov. 16. Treaty of conciliation and judicial settlement with Switzerland signed at Berne.

France.

1927. Jan. 28. Convention with Germany of May 22, 1926, regarding commercial air navigation (ratified by Germany on Dec. 6, 1926) ratified by France and came into force.
 March 12. Ratifications exchanged of liquor smuggling treaty with the United States of June 30, 1924.
 April 6. M. Briand made statement to Associated Press that France would be willing to conclude with United States an engagement to outlaw war between the two countries. May 30, draft of model "*American Locarno*" treaty outlawing war published in United States. June 20, Memorandum submitted to U.S. Secretary of State setting forth French Government's views as to Franco-American Pact to replace arbitration treaty of 1908, which was due to expire on Feb. 27, 1928. Dec. 28, U.S. reply sent, suggesting inclusion of other Powers in Pact to outlaw war.
 Sept. 7. U.S. Government asked French Government for most-favoured-nation treatment in commercial matters, in view of decree of Aug. 30, 1927, modifying tariff as result of Franco-German agreement of Aug. 17. Sept. 15-Oct. 24, correspondence between two Governments. Oct. 26, agreement reached between U.S. chargé d'affaires and French Minister for Commerce that during negotiations U.S. should be granted tariff in force before conclusion of Franco-German agreement. Nov. 2-9, further correspondence. Nov. 12, French Minister for Commerce announced that negotiations had been concluded satisfactorily. Nov. 15, U.S. Government informed that new régime would come into force on Nov. 21.
 Oct. 20. Arbitration treaty with Luxembourg signed in Paris.
 Nov. 11. Treaty of friendship and arbitration with Yugoslavia signed in Paris. (Text: *Temps*, 29.11.27; *E.N.*, 10.12.27; *Europ. Econ. & Polit. Survey*, Nov. 30, 1927.)
 Dec. 3. *Modus vivendi* with Italy regarding reciprocal position of nationals of either country signed in Paris.

Germany.

1927. Jan. 31. Inter-Allied Military Commission of Control withdrawn from Germany. Feb. 1, Conference of Ambassadors approved agreement concluded on Jan. 31 between French and German delegates regarding fortifications on eastern and southern frontier and reached settlement of question of trade in war materials. Feb. 5, notes exchanged recording settlement with regard to fortifications. Feb. 26 and 28, notes exchanged recording agreement on draft German Bill prohibiting import and export of war materials. June 13, German Government sent notes to

Governments formerly represented on Control Commission notifying them that fortifications marked for destruction in agreement of Jan. 31 had been demolished. July 8, French and Belgian experts completed verification of work of destruction of fortifications. July 22, Conference of Ambassadors formally notified League of Nations that Commission of Control had been dissolved on Jan. 31.

Feb. 16. Agreement with Poland regarding the administration of the section of the Warthe constituting the frontier, and transit over this section, signed at Posen.

May 20. Air Navigation agreement with Italy signed in Berlin.

June 8. Ratifications of agreement with Poland of Aug. 19, 1926, regarding the administration of the frontier territory of the Oder, exchanged in Berlin. Aug. 3, agreement came into force.

June 27. Ratifications exchanged of treaty of conciliation and arbitration with Italy of Dec. 29, 1926.

June 29. Air Convention with Great Britain signed in Berlin. Dec. 1, ratifications exchanged.

July 14. Ratifications of arbitration treaty with the Netherlands of May 20, 1926, exchanged at Berlin. July 15, treaty came into force.

Aug. 26. Agreement reached between French and British Governments for reduction of Allied troops of occupation by 10,000 men, leaving about 60,000 in all. Sept. 5, Dr. Stresemann formally notified of reduction at Geneva.

Greece.

1927. June 14. Greek Government asked Council of the League of Nations to assist them in obtaining an international loan of £9,000,000 (to be used to complete the work of refugee settlement, stabilize currency and liquidate deficits) and to authorize the Financial Committee to help in the work of financial reorganization. June 17, Council approved Greek Government's proposals in principle. Sept. 15, Council approved Protocol embodying conditions for issue of new loan and scheme of financial reform drawn up by Financial Committee; protocol signed at Geneva by Greek Finance Minister. Oct. 27, Agreement signed between Greek Government and National Bank of Greece for establishment of a new Bank of Issue. Nov. 10, protocol of Sept. 15, 1927, and agreement for creation of Bank of Issue ratified by Greek Government. Dec. 8, Declaration issued by representatives of France, Great Britain, and Italy, accepting responsibilities imposed by protocol of Sept. 15 on International Finance Commission established at Athens in 1898.

Aug. 25. Greek Chamber rejected treaty of alliance with Yugoslavia and conventions regarding Salonica Free Zone and Gevgeli-Salonica Railway signed on Aug. 17, 1926.

Geneva Naval Conference.

1927. Feb. 10. President Coolidge sent special message to Congress on limitation of naval armaments; U.S. memorandum presented to British, French, Italian, and Japanese Governments suggesting negotiation of a new agreement, limiting naval armaments, and applying to classes of vessels not covered by Washington Treaty. Feb. 15, French Government replied rejecting proposal for separate naval conference and suggesting discussion of problems by Preparatory Commission at Geneva. Feb. 19, Japanese Government accepted proposal but suggested postponement of Conference till June. Feb. 21, Italian Government rejected proposal. Feb. 25, British Government replied agreeing to proposal. March 10, following informal inquiries, British Ambassador in Washington informed State Dept. that Great Britain would take part with U.S. and Japan in three-Power Naval Conference. May 11, Japanese Ambassador announced willingness of his Government to participate; Notes presented conveying formal invitation of U.S. to Conference. March 14, U.S. Government invited France and Italy to send observers to Conference. April 4, French Government replied postponing decision as to observer pending result of disarmament discussions at Geneva. May 17, Italy replied reserving right to send one or more observers. June 20, Conference opened at Geneva between delegates from U.S., Japan, Gt. Britain, and Dominions. Italy represented by an observer, France by an "informateur". At opening meeting head of each delegation put forward his Government's programme for limitation of

naval armaments. July 8, Experts committee of conference issued report, recording agreement which had been reached regarding destroyers and submarines ; no agreement reached regarding cruisers. July 14, Plenary session of Conference held ; heads of delegations made fresh statements as to their Governments' positions, especially on cruiser question. July 18, at informal meeting of three delegations, proposed compromise, which had been agreed on between British and Japanese delegations regarding cruisers, communicated to U.S. delegation. July 19, Conference suspended in order to allow delegates to consult their Governments, chief British delegates summoned to London to confer with Cabinet. July 27, British delegates left London again for Geneva. Sir A. Chamberlain made statement on Conference in House of Commons. July 28, New British proposals submitted to other delegations. July 29, Official statement issued in U.S. that British proposals could not be accepted without modification. Aug. 1, Japanese delegation put forward new proposals for compromise to U.S. delegation. Aug. 4, Plenary session of Conference failed to reach agreement and decided to adjourn negotiations, with recommendation that Conference for revision of Washington Treaty should be held at an earlier date than 1931.

Hungary.

1927. Feb. 10. Governments of Czechoslovakia, Yugoslavia, and Rumania, sent identic notes to Conference of Ambassadors asking that they should be consulted before the decision was taken to withdraw the Military Control Commission from Hungary. March 29, Conference of Ambassadors, after consulting Little Entente Governments, decided that Military Control Commission should cease to function on March 31, but that its members should remain in Hungary till May 15 to liquidate work. Aug. 16, Conference of Ambassadors notified League of Nations that Control Commission had been withdrawn and drew Council's attention to certain reservations expressed by Commission regarding application of Hungarian recruiting laws. April 5. Treaty of friendship, conciliation and arbitration with Italy signed in Rome. (Text : *Corriere della Sera*, 7.4.27 ; *E.N.*, 10.12.27.) Aug. 8, ratifications exchanged. May 23. Three conventions with Italy signed in Paris : (i) regarding settlement of questions raised by the annexation to Italy of Fiume ; (ii) regarding settlement of claims brought before Mixed Arbitral Tribunal by Hungarian or Italian nationals ; (iii) declaration regarding procedure of settlement of Italo-Hungarian compensations. July 25. Convention with Italy signed at Rome, regarding the use by Hungary of the port of Fiume.

Iceland.

1927. March 15. Ratifications exchanged of convention with Great Britain of Oct. 25, 1905, revived on June 4, 1926, for the pacific settlement of international disputes (*Cmd.* 2836).

International Labour Conference.

1927. May 25-June 16. Tenth session of Conference held at Geneva. Two draft conventions adopted dealing with sickness insurance for workers in industry and commerce, and domestic servants and for workers in agriculture ; and a recommendation concerning general principle of sickness insurance.

'Irāq.

1927. March 19. Turco-'Irāqī Frontier Commission met at Mosul to begin work of delimitation provided for in Anglo-'Irāqī-Turkish Treaty of June 5, 1926. Sept. 23, Report of Commission signed. Oct. 20. King Faysal arrived in London. Oct. 25, formal negotiations for revision of Anglo-'Irāqī Treaty began. Dec. 14, new treaty signed in London. (Text : *T.*, 21.12.27 ; *Cmd.* 2998 ; *Europ. Econ. & Polit. Survey*, Dec. 31, 1927.)

Italy.

1927. Sept. 18. Treaty of friendship and arbitration, and trade agreement with Lithuania signed at Rome.

Latvia.

1927. Oct. 10. Convention with Russia regarding arbitral procedure in civil and commercial matters signed at Riga.

Oct. 15. Frontier treaty with Lithuania signed at Riga.

League of Nations.

1927. Jan. 10. Hungarian-Rumanian Mixed Arbitral Tribunal declared itself competent under Treaty of Trianon to try claims brought by Hungarian landowners that their property had been confiscated under Rumanian agrarian laws. Feb. 24, Rumanian Government denied competence of tribunal to try agrarian cases, announced decision to withdraw their judge from tribunal when such cases came before it, and asked Council of League for hearing in support of their decision. March 7, Hungarian and Rumanian delegates heard by Council. Hungarian delegate asked Council to appoint two deputy arbitrators to replace Rumanian judge on M.A.T., and suggested that question of tribunal's competence in agrarian disputes be referred to Permanent Court of International Justice. March 8, Council referred question to special committee of three (Sir A. Chamberlain, rapporteur). Sept. 17, Special committee reported that M.A.T. was not competent to adjudicate claims arising from application of agrarian laws as such and that Treaty of Trianon could not prevent agrarian reform being applied to Hungarian landowners, provided there was no discrimination against them. Committee recommended that Rumanian judge should return to M.A.T. Sept. 19, Council decided to postpone question to December session and recommended special committee's conclusions to both parties for consideration. Nov. 15, Hungarian Government notified League that they could not accept special committee's report, but made proposals for direct settlement to Rumania. Nov. 25, League Secretariat informed by Rumanian Government that they accepted special committee's report. Dec. 5, Council decided to postpone question till March and to recommend Rumania to consider Hungarian proposals for settlement.

Feb. 7-18. Special Body of Experts, appointed by Council to investigate traffic in women and children, met at Geneva and drew up report (in two parts) on result of two years' work.

March 7-12. Forty-fourth session of Council held at Geneva.

March 21-April 26. Preparatory Commission for Disarmament Conference held third session at Geneva. Commission considered draft conventions on limitation of military, naval, and air armaments submitted by British and French delegates, and drew up text for further discussion.

March 22-April 2. Third annual session of Committee of Experts on Progressive Codification of International Law held at Geneva. First part of committee's work completed in readiness for codification conference.

May 4-23. International Economic Conference met in Geneva, attended by representatives of fifty countries and of international organizations, and drew up a programme in favour of lowering of tariff barriers and "freer" trade in general.

June 13-17. Forty-fifth session of Council held at Geneva.

July 4-12. International Conference to consider creation of an international relief union for assistance of peoples overwhelmed by disaster held at Geneva and attended by representatives of forty-two states. Convention and statute for creation of union adopted by conference and signed by nine states.

Aug. 23-Sept. 2. Third General Conference on Communications and Transit held at Geneva, attended by representatives of thirty-four countries.

Sept. 1-28. Forty-sixth session of Council held at Geneva.

Sept. 5-27. Eighth session of Assembly held at Geneva. Sept. 24, Assembly adopted resolution proposed by Polish delegation prohibiting all aggressive wars. Sept. 26, Assembly adopted resolutions dealing with arbitration, security, and disarmament.

Oct. 17-Nov. 8. International Conference on import and export prohibitions met at Geneva, attended by representatives of thirty-three states. Convention drawn up by Conference and signed on Nov. 8 by eighteen countries.

Nov. 30-Dec. 3. Fourth session of Preparatory Commission for Disarmament Conference held at Geneva; Soviet Government represented for first time. Nov. 30, Soviet delegate put forward proposals for complete universal disarmament.

Dec. 1-2. Committee on Arbitration and Security, constituted by Preparatory Disarmament Commission on Nov. 30, held first meeting. Dec. 2, Committee adjourned till Feb., 1928.

Dec. 5-12. Forty-seventh session of Council held at Geneva.

Lithuania.

1927. Oct. 4. In reprisal for alleged action of Lithuanian Government regarding education of Polish minority in Lithuania, Polish authorities arrested a number of Lithuanians and closed schools in Vilna district. Oct. 15, Lithuanian Government appealed to League against treatment of Lithuanians in Vilna district. Nov. 24, Soviet note presented to Poland on subject of Lithuanian-Polish dispute. Nov. 26, Polish Government notified Powers of its intention to ask League Council to use its influence to end "state of war" with Lithuania. Nov. 28, Polish Government sent note to Great Britain, France, Germany, and U.S.S.R., defining its attitude regarding relations with Lithuania. Dec. 7, League Council heard Lithuanian Prime Minister, M. Valdemaras, and Polish Foreign Minister, M. Zaleski, and referred question to special committee. Dec. 9, Marshal Pilsudski arrived at Geneva. Dec. 10, announced at meeting of League Council that Poland and Lithuania accepted a resolution by which Lithuania declared that she no longer considered herself in a state of war with Poland; Poland undertook to respect the political independence of Lithuania, and both parties agreed to begin negotiations with a view to establishing a good understanding. Resolution expressly declared not to affect in any way questions on which the two Governments held divergent views.

Mexico.

1927. March 30. Agreement signed with Great Britain to adjudicate claims by British subjects for losses in revolts.

Morocco.

1927. April 2. Announced at Rabat that group of Sinhaja tribes were in insurrection against the Spaniards. April 18, Spanish offensive began. May 17, French troops began clearing operations in frontier district of French zone. May 29, French troops began operations decided upon by French and Spanish commands with object of occupying border territory. June 22, French operations reported to be concluded. July 11, Official *communiqué* issued at Madrid announcing complete occupation of Spanish zone and end of military campaign.

Netherlands.

1927. March 24. Treaty with Belgium of April 3, 1925, regarding the Scheldt rejected by First Chamber.

June 11. Ratifications of treaty of conciliation and arbitration with Sweden of Dec. 12, 1925, exchanged.

Nicaragua.

1927. Jan. 4. Official statement issued at Washington that United States was interested in Nicaragua, not only for protection of American lives and property, but also on account of rights under Bryan-Chamorro Treaty of 1914, in possible canal route across Nicaragua. Jan. 5, U.S. State Department announced removal of embargo on export of arms to Diaz Government. Jan. 10, President Coolidge sent special message to Congress explaining his policy in Nicaragua and referring to Mexican support of Liberal revolutionaries. Feb. 9, President Diaz offered to withdraw in favour of another President if U.S. considered it desirable. Feb. 10, similar offer made on behalf of Dr. Sacasa, Liberal leader. Feb. 22, President Diaz submitted to U.S. Minister in Nicaragua proposals for a treaty by which U.S. would undertake to guarantee interests of Nicaragua for 100 years. Feb. 28, H.M.S. *Colombo* arrived at Corinto, to provide refuge, if necessary, for British citizens in Nicaragua. H.M.S. *Colombo* left Corinto again on March 5. March 7, 1,600 additional American marines landed at Corinto. April 9, Mr. Henry L. Stimson left for Nicaragua as special envoy of President Coolidge. April 22, President Diaz communicated to Mr. Stimson peace terms which he was willing

should be submitted to Liberal forces. May 4, Conference between Mr. Stimson and General Moncada, Liberal leader, began. May 5, President Diaz proclaimed general amnesty. May 12, General Moncada and other Liberal leaders (excluding General Sandino) agreed to lay down their arms and accept condition that President Diaz should remain in office until the Presidential elections of 1928, which should be supervised by U.S. May 13, opposing forces began to hand over arms to American marines. Disarmament reported to be practically complete by June 6. On June 17, withdrawal of American marines began. July 12, ultimatum sent to General Sandino by American marines, requiring him to surrender arms by July 14. July 16, General Sandino repulsed in fight with American marines and Nicaraguan police. Occasional fighting between U.S. Marines and forces of General Sandino and General Salgado continued till end of year. Nov. 6, Municipal elections held in Nicaragua under supervision of U.S. marines. Nov. 9, Announced in Washington that Dr. W. Cumberland was being sent to Nicaragua by U.S. State Department to make an economic and financial survey of the country.

Panama.

1927. Jan. 26. National Assembly of Panama referred treaty with United States of July 28, 1926, back to President for further negotiation.

Persia.

1927. May 10. Persian Government notified Powers enjoying special jurisdictional privileges that those privileges would be abolished from May 10, 1928.

Aug. 14. Exchange of notes with Russia at Teheran regarding the institution of outposts at various points on the frontier.

Oct. 1. Pact with Russia signed at Moscow, consisting of (i) guarantee of neutrality ; (ii) agreement regarding commercial relations ; (iii) agreement regarding exploitation of fisheries on the south bank of the Caspian ; (iv) customs convention ; (v) notes regarding the port of Pekhlavi. Oct. 21, (i) ratified by Persia. (Text : *Europ. Econ. & Polit. Survey*, Oct. 15, 1927 ; *E.N.*, 29.10. 27.)

Oct. 1-6. Exchange of notes with Turkey on subject of disturbances on frontier.

Peru.

1927. Jan. 12. Peruvian Government sent note to U.S. Government rejecting proposals made by State Department for settlement of Tacna-Arica controversy with Chile.

Poland.

1927. Feb. 9. Ratifications of treaty of alliance with Rumania of March 26, 1926, exchanged.

March 25. Consular convention with Turkey signed.

March 28. Ratifications exchanged at Warsaw of conciliation and arbitration treaty with Sweden, signed at Stockholm on Nov. 3, 1925. April 28, treaty came into force.

June 7. M. Voikov, Soviet Minister to Poland, mortally wounded at Warsaw. Note of protest from Soviet Government handed to Polish Minister at Moscow. June 9, Polish reply presented. June 13, further Soviet note presented, making certain demands regarding investigation of the crime and prevention of anti-Soviet activities. June 16, M. Voikov's murderer sentenced by Polish court to penal servitude for life. Aug. 26, questions arising out of M. Voikov's murder satisfactorily settled in conversations between M. Chicherin and Polish Minister.

Portugal.

1927. Jan. 4. Exchange of notes with Great Britain prolonging for five years, as from Nov. 16, 1926, arbitration treaty of Nov. 16, 1914. (*Cmd.* 2796.)

June 17. Ratifications exchanged of convention with Spain of June 29, 1926, for the delimitation of the Spanish-Portuguese frontier from the confluence of the rivers Cuncos and Guadiana to the mouth of the Guadiana.

Russia.

1927. Feb. 23. Note from Great Britain protesting against breaches of Trade Agreement of 1921 and of undertaking to abstain from propaganda of June 4, 1923, presented to Soviet representative in London. Feb. 26, reply, signed by M. Litvinov, handed to British chargé d'affaires. (Texts : *Cmd.* 2822 ; *T.*, 28.2.27.)
- April 14. Protocol signed in Berlin settling with Switzerland dispute resulting from the murder of M. Vorovski at Lausanne in 1923 and acquittal of his murderer.
- May 12. Premises of Arcos Ltd. in London raided by British police. May 13, note of protest from M. Rosengolz, Soviet chargé d'affaires, presented to Sir A. Chamberlain. May 17, note of protest from M. Litvinov presented to British chargé d'affaires in Moscow. May 27, note (dated May 26) from Sir A. Chamberlain presented to M. Rosengolz, announcing termination of trade agreement of March 16, 1921, and breaking off diplomatic relations, and requesting M. Rosengolz and his staff to leave within ten days. (Text : *T.*, 28.5.27.) June 3, M. Rosengolz and part of staff left London ; British Mission left Moscow.
- June 24. Official announcement made of decision of Majority Group headed by Stalin to expel Trotsky and Zinoviev from Central Executive Committee of Russian Communist Party. Aug. 9, Plenary joint session of Central Committee of Communist Party and Central Control Commission concluded its meeting without approving decision to expel Trotsky and Zinoviev. Sept. 27, Trotsky and Zinoviev expelled from Executive Committee of Third International. Oct. 23, Trotsky and Zinoviev expelled from Central Executive Committee of Communist Party. Nov. 15, Trotsky expelled from Russian Communist Party ; a number of other opposition leaders expelled from Central Executive Committee of Communist Party.
- Aug. 9. M. Rakovsky, Soviet Ambassador in Paris, signed declaration issued by Minority Group of Central Committee of Communist Party calling on nationals of countries with which Soviet Government might be at war to work actively for defeat of their Governments, and on soldiers and sailors to desert to Red Army. Aug. 29, M. Chicherin gave French Ambassador, who had protested against M. Rakovsky's signature of declaration, written disavowal of M. Rakovsky's action. Sept. 4, M. Rakovsky issued statement that declaration which he had signed applied only to a hypothetical case and in no way referred to France. Sept. 17, French Ministerial Council decided that there was no immediate justification for breaking off diplomatic relations with the Soviet Government and that negotiations should be pursued regarding a Russian proposal for a pact of non-aggression. Oct. 1, French Ambassador informed Soviet Government that French Government wished M. Rakovsky to be replaced. Oct. 4, M. Chicherin asked that request for M. Rakovsky's recall should be presented in writing. Oct. 7, French note presented, asking for M. Rakovsky's recall, but indicating that French Government did not wish to break off relations. Oct. 13, Soviet reply presented, informing French Government of M. Rakovsky's recall. Oct. 16, M. Rakovsky left Paris.
- Sept. 8. British Trades Union Congress adopted recommendation of General Council that negotiations with Russian trade unions should be broken off.
- Oct. 8. Agreement with Sweden signed at Moscow, completing trade treaty of March 15, 1924, and regulating status of Soviet Trade Delegation in Sweden. (Text : *Europ. Econ. & Polit. Survey*, Nov. 15, 1927.)

Saar.

1927. March 12. League Council decided to approve proposal of Governing Commission for creation of an international railway defence force of 800 men, on understanding that French troops should be withdrawn from Saar Territory within three months, that new defence force should only be used in exceptional circumstances and that Governing Commission should, if it seemed desirable, reduce number below 800 without further reference to Council. Evacuation of French troops completed by June 10.

Siam.

1927. Feb. 2. Ratifications exchanged of arbitration convention with Great Britain of Nov. 25, 1925. (*Cmd.* 2813.)

March 25. Ratifications exchanged of treaty of amity and commerce with Belgium of July 13, 1926. Came into force same day.

June 29. Ratifications exchanged of convention with France of Aug. 25, 1926, regarding Siam and French Indo-China.

Spain.

1927. Jan. 14. Ratifications exchanged of arbitration treaty with Uruguay of March 23, 1922.

Jan. 29. Ratifications exchanged of treaty of conciliation and judicial regulation of disputes with Switzerland of April 20, 1926. Came into force same day.

Aug. 4. Ratifications exchanged of declaration of Aug. 4, 1926, by which Swiss Government renounced capitulatory rights in Spanish Zone in Morocco. Came into force Aug. 14.

Sweden.

1927. Feb. 24. Ratifications exchanged of convention with Uruguay of Feb. 24, 1923, for the pacific settlement of differences.

Switzerland.

1927. Aug. 7. Establishment convention with Turkey signed at Angora.

Turkey.

1927. Jan. 18. United States Senate rejected treaty of friendship with Turkey, signed at Lausanne on Aug. 6, 1923. Feb. 17, agreement with United States concluded by exchange of notes at Constantinople, providing for resumption of diplomatic relations and regulation of trade.

United States.

1927. May 19. Agreement concluded with Great Britain by exchange of notes regarding disposal of certain pecuniary claims arising out of the war. (Text: *Cmd.* 2877.)

GENERAL INTERNATIONAL AGREEMENTS ¹

AERIAL NAVIGATION: Convention and Protocols—(1) Convention (Paris, Oct. 13, 1919); (2) Additional Protocol (Paris, May 1, 1920); (3) Protocol regarding modification of Art. 5 of 1919 Convention (London, Oct. 27, 1922); (4) Protocol amending Art. 34 (London, June 30, 1923).

Ratifications: Yugoslavia (3 and 4), Dec. 14, 1926; South Africa (1 and 2), August 16, 1927.

Accessions: Denmark (2), Oct. 14, 1927; Saar (1 and 2), April 28, 1927; Sweden (1 and 2), July 16, 1927.

— Spanish-American Convention (Madrid, Nov. 1, 1926).

Signatures: Argentine, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Salvador, Spain, Uruguay, Venezuela.

Ratification: Spain, April 13, 1927.

AGRICULTURE: Creation of an International Institute of, at Rome—Convention (Rome, May 28, 1905.)

Accessions: Siam; Venezuela (Sept. 11, 1926).

— Protocol (Rome, Oct. 5, 1926.)

Signatures: Argentine, Austria, Belgium, Bulgaria, Estonia, Finland, France (and colonies), Great Britain (and Irish Free State, India, New Zealand and South Africa), Italy (and colonies), Lithuania, Norway, Spain, Sweden, Switzerland.

Ratification: Austria, Feb. 2, 1927.

ALCOHOLIC LIQUORS: Suppression of Contraband Traffic in—Convention (Helsingfors, August 19, 1925) and Protocol (Moscow, April 22, 1926).

Ratifications: Germany, August 10, 1927; Poland (with Danzig), August 1, 1927.

¹ The place and date of signature are given in brackets.

ARBITRATION CLAUSES : Recognition of Validity in Commercial Matters—Protocol (Geneva, Sept. 24, 1923).

Signature : Danzig, August 5, 1927.

Ratifications : Monaco, Feb. 8, 1927 ; Norway, Sept. 2, 1927 ; Palestine, March 12, 1926.

ARMS AND AMMUNITION : Convention and Protocols (Geneva, June 17, 1925). (1) Convention for the supervision of the international trade in arms and ammunition and instruments of war ; (2) Statement regarding the Territory of Ifni ; (3) Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of war ; (4) Protocol of signature ; (5) Final Act.

Ratification : France (1–4).

BALTIC STATES : Geodesic Convention (Helsingfors, Dec. 31, 1925).

Signatures : Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Sweden.

Accession : Danzig, Jan. 1, 1926.

CHINA : Treaties relating to—(1) Principles and Policies ; (2) Customs tariff. (Washington, Feb. 6, 1922.)

Accession : Mexico (1).

COMMUNICATIONS AND TRANSIT : Conventions (Barcelona, April 20, 1921). (1) Freedom of transit (convention and statute) ; (2) Navigable waterways (convention, statute, and additional protocol) ; (3) Right to a flag of states having no sea-coast.

Ratifications : Belgium (1, 3), May 16, 1927 ; France (1), Dec. 31, 1926.

— Conventions and Statutes (Geneva, Dec. 9, 1923). (1) International régime of railways (convention, statute and protocol of signature) ; (2) International régime of maritime ports (convention, statute and protocol of signature) ; (3) Transmission in transit of electric power (convention, statute and protocol of signature) ; (4) Development of hydraulic power affecting more than one state (convention and protocol of signature).

Ratifications : Austria (1, 3, 4), Jan. 20, 1927 ; Belgium (1, 2), May 16, 1927 ; Czechoslovakia (3), Nov. 30, 1926 ; Greece (2), Jan. 24, 1927 ; Sweden (1, 2), Sept. 15, 1927.

Accessions : Austria (2), Jan. 20, 1927 ; Uganda (3), Jan. 12, 1927.

CURRENCY AND BANKING REFORM IN ESTONIA : Protocol (Geneva, Dec. 10, 1926).

Ratification : Estonia, May 10, 1927.

CUSTOMS FORMALITIES : Convention (Geneva, Nov. 3, 1923).

Ratifications : Bulgaria, Dec. 10, 1926 ; Czechoslovakia, Feb. 10, 1927 ; France, Sept. 13, 1926 ; Greece, July 6, 1927 ; Luxembourg, June 10, 1927 ; Switzerland, Jan. 3, 1927.

EPIZOOTIC OFFICE : Creation of—Convention (Paris, Jan. 25, 1924).

Ratifications : Bulgaria, Jan. 11, 1927 ; Egypt, Jan. 6, 1927 ; Italy, May 23, 1927 ; Rumania, July 16, 1927 ; Siam, May 6, 1927 ; Spain, Feb. 11, 1927 ; Tunis, Feb. 13, 1925.

Accessions : Cyprus, Sept. 8, 1927 ; Falkland Islands, Sept. 8, 1927 ; Gold Coast, Sept. 8, 1927 ; Malay States, Sept. 8, 1927 ; Malta, Sept. 8, 1927 ; Palestine, Sept. 8, 1927 ; Russia, Sept. 8, 1927 ; Somaliland (British), Sept. 8, 1927.

GAUGING OF TONNAGE OF VESSELS : Unification of system of, on inland waterways of Europe—Convention (Paris, Nov. 27, 1925).

Ratifications : Austria, July 4, 1927 ; Belgium, July 2, 1927 ; Bulgaria, July 2, 1927 ; France, July 2, 1927 ; Germany, July 2, 1927 ; Great Britain and Northern Ireland, June 14, 1927 ; Netherlands, July 2, 1927 ; Spain, July 11, 1927 ; Switzerland, July 2, 1927.

HAGUE CONVENTIONS : Accession to conventions on private international law by states not represented at the Hague Conferences of 1902 and 1905—Protocols (The Hague, Nov. 28, 1923 and July 4, 1924).

Signatures : Finland, Nov. 23, 1926 ; Poland (with Danzig), June 9, 1926.

IMPORT AND EXPORT TRADE : Convention and Final Act for the abolition of prohibitions and restrictions on import and export trade (Geneva, Nov. 8, 1927).

Signatures : Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Great Britain, Hungary, Italy, Japan, Luxembourg, Netherlands, Rumania, Siam, Switzerland.

LABOUR : Draft Conventions (Washington, Nov. 28, 1919). (1) Limitation of hours of work ; (2) Unemployment ; (3) Employment of women before and after childbirth ; (4) Night work of young persons employed in industry ; (5) Minimum age for admission of children to industrial employment ; (6) Night work of women.

Ratifications : Germany (3), Oct. 31, 1927 ; Yugoslavia (2-6), April 1, 1927.

— Draft Conventions (Genoa, June 15-July 10, 1920). (1) Minimum age for admission of children to employment at sea ; (2) Unemployment indemnity in case of loss or foundering of the ship ; (3) Facilities for finding employment for seamen.

Ratifications : Norway (1), Oct. 7, 1927 ; Yugoslavia (1), April 1, 1927.

— Draft Conventions (Geneva, Oct. 25-Nov. 19, 1921). (1) Minimum age for admission of children into employment in agriculture ; (2) Rights of association in agriculture ; (3) Workmen's compensation in agriculture ; (4) Use of white lead in painting ; (5) Application of the weekly rest in industry ; (6) Minimum age for admission of young persons to employment as trimmers and stokers ; (7) Compulsory medical examination of children and young persons employed at sea.

Ratifications : Greece (4), Dec. 22, 1926 ; Hungary (1), Feb. 2, 1927 ; Yugoslavia (5-7), April 1, 1927 ; Norway (6), Oct. 7, 1927.

— Amendment to Art. 393 of the Treaty of Versailles and to corresponding articles of other Treaties of Peace, adopted by the International Labour Conference at its fourth session—(1) Convention ; (2) Protocol (Geneva, Nov. 2, 1922).

Ratifications : Greece, June 8, 1927 ; Yugoslavia (2), March 11, 1927 ; Portugal (1), Sept. 13, 1926.

— Draft Conventions (Geneva, June, 1925). (1) Workmen's compensation for accidents ; (2) Equality of treatment for national and foreign workers as regards workmen's compensation for accidents ; (3) Night work in bakeries ; (4) Workmen's compensation for occupational diseases.

Ratifications : Belgium (1, 2, 4), Oct. 3, 1927 ; Czechoslovakia (2), Feb. 8, 1927 ; Finland (2, 4), Sept. 17, 1927 ; India (2, 4), Sept. 30, 1927 ; Irish Free State (4), Nov. 25, 1927 ; Yugoslavia (1, 2, 4), April 1, 1927 ; Netherlands (1, 2), Sept. 13, 1927 ; Switzerland (4), Nov. 16, 1927.

— Draft Conventions (Geneva, June 5-June 24, 1926). (1) Simplification of the inspection of emigrants on board ship ; (2) Repatriation of seamen ; (3) Seamen's articles of agreement.

Ratifications : Belgium (2, 3), Oct. 3, 1927 ; Great Britain and Northern Ireland (1), Sept. 16, 1927 ; Netherlands (1), Sept. 13, 1927.

LEAGUE OF NATIONS : Amendments to Articles 4, 6, 12, 13, 15, 16, 26 of Covenant—Protocols (Geneva, Oct. 5, 1921).

Ratification : Austria (Arts. 16 and 26), August 29, 1927.

— Amendment to Article 16 of the Covenant (Geneva, Sept. 27, 1924).

Ratification : Estonia, Sept. 18, 1926.

— Amendment to second paragraph of original text of Article 16 of the Covenant—Protocol (Geneva, Sept. 21, 1925).

Ratifications : Estonia, Sept. 18, 1926 ; Netherlands, August 20, 1926.

LITERARY AND ARTISTIC WORKS : Convention for the Protection of—(Montevideo, Jan. 11, 1889).

Ratification : Germany, Sept. 1, 1927.

— Revised Convention (Berne, Nov. 13, 1908 ; Additional Protocol, March 20, 1914).

Accessions : Estonia, July 9, 1927 ; Irish Free State, Oct. 5, 1927.

MARITIME LAW : Unification of certain rules—Conventions (Brussels, Aug. 25, 1924).

(1) Limitation of responsibility of shipowners ; (2) Maritime privileges and mortgages ; (3) Recognition.

Signature : Portugal (1), Oct. 9, 1926.

- Unification of certain rules—Conventions (Brussels, April 10, 1926). (1) Immunity of state ships ; (2) Maritime privileges and mortgages.
Signature : Japan (2), Oct. 10, 1926.
- MATCHES : White Phosphorus**—Convention (Berne, Sept. 26, 1906).
Accession : Morocco, July 5, 1927.
- MOTOR VEHICLES : International Circulation of**—Convention (Paris, Oct. 11, 1909).
Accessions : Argentine, April 27, 1927 ; Egypt, June 18, 1927.
- OBSCENE PUBLICATIONS : Repression**—Convention (Geneva, Sept. 12, 1923).
Ratifications : Czechoslovakia, April 11, 1927 ; Luxembourg, August 10, 1927 ; Netherlands (including Netherlands Indies, Surinam and Curaçao), Sept. 13, 1927 ; Poland, March 8, 1927 ; Portugal, Oct. 4, 1927.
Accessions : Bahamas, May 23, 1927 ; Bermudas, May 23, 1927 ; Falkland Islands, May 23, 1927 ; Jamaica, August 22, 1927 ; Palestine, May 23, 1927 ; St. Helena, May 23, 1927 ; Transjordan, May 23, 1927.
- OPIUM : Convention**—Second Protocol (The Hague, Jan. 23, 1912).
Signature : Venezuela, July 12, 1927.
- First Conference—Agreement, Protocol and Final Act (Geneva, Feb. 11, 1925).
Ratifications : Netherlands (including Netherlands Indies, Surinam and Curaçao), March 1, 1927 ; Portugal, Sept. 13, 1926 ; Siam, May 6, 1927.
- Second Conference—(1) Convention ; (2) Protocol ; (3) Final Act (Geneva, Feb. 19, 1925).
Ratifications : Austria, Nov. 25, 1927 ; Belgium (1), August 24, 1927 ; Bulgaria (1, 2), March 9, 1927 ; Czechoslovakia (1, 2), April 11, 1927 ; France, July 2, 1927 ; Poland (and Danzig) (1), June 16, 1927 ; Portugal, Sept. 13, 1926 ; Salvador (1, 2), Dec. 2, 1926 ; Siam, May 6, 1927.
Accessions : Bolivia (1 and 2, subject to ratification), Jan. 19, 1927 ; Monaco, Feb. 9, 1927 ; Venezuela (1, 2), June 25, 1927.
- PERMANENT COURT OF INTERNATIONAL JUSTICE : (Geneva, Dec. 16, 1920).** (1) Protocol of Signature ; (2) Optional Clause.
Signatures : Austria (2), Jan. 12, 1927 ; Finland (2), March 3, 1927 ; Germany (1), Dec. 10, 1926 ; (2), Sept. 9, 1927 ; Guatemala (1, 2), Dec. 17, 1926.
Ratifications : Austria (2), March 13, 1927 ; Germany (1), March 11, 1927.
- POSTAL : Pan-American Conventions (Mexico, Nov. 9, 1926).** (1) Convention and Final Protocol ; (2) Convention regarding money orders ; (3) Convention regarding parcel post.
Ratifications : Cuba (1) ; Ecuador (1, 3) ; Spain (1-3), June 21, 1927 ; Panama (1, 3), May 17, 1927 ; United States (1, 3).
- Radio-Telegraph Convention—Revision (London, July 5, 1912).
Accessions : Finland, Feb. 5, 1927 ; French Guinea, Jan. 5, 1927 ; Haiti, Oct. 10, 1927 ; Liberia, Oct. 10, 1927 ; Paraguay, Sept. 2, 1927 ; Salvador, Oct. 12, 1927 ; South Sea Islands, August 5, 1927 ; Togoland, Oct. 20, 1926.
- Telegraph Convention (St. Petersburg, July 22, 1875 ; Revision, Lisbon, June 11, 1908).
Accession : Indian Radiotelegraph Company, Dec. 20, 1926.
- Universal Postal Union—Revised Conventions (Stockholm, August 28, 1924). (1) Universal Postal Convention ; (2) Letters and parcels of declared value ; (3) Parcel post ; (4) Postal orders ; (5) Postal transfers ; (6) Payment on delivery ; (7) Subscriptions to periodicals ; (8) Final Protocol.
Ratifications : Algiers (1, 2, 3, 4, 6, 7), June 9, 1926 ; Belgium and Belgian Congo (3), May 11, 1926 ; Brazil (8), March 23, 1926 ; Egypt (1, 2, 3, 4, 6, 7), Nov. 30, 1926 ; Ethiopia (1, 2, 3, 4), Nov. 23, 1926 ; Indo-China, Togo and Cameroons (1-4), June 9, 1926 ; Italy (1-8), Nov. 26, 1926 ; Jugoslavia (1-7), Nov. 24, 1926 ; Paraguay (1), Dec. 8, 1926 ; Venezuela (8), May 3, 1927.
Accessions : Hejaz (1, 2, 3, 4, 6, 7), Jan. 1, 1927 ; Southern Rhodesia (2), Dec. 11, 1926 ; Tanganyika (2), August 22, 1927 ; Transjordan (1), July 11, 1927.
- PUBLIC HEALTH OFFICE : Convention (Rome, Dec. 9, 1907).**
Accessions : Belgian Congo, March 17, 1927 ; Italy, May, 1927 ; Luxembourg, July 19, 1926 ; Sudan, Dec. 6, 1926 ; U.S.S.R., Jan. 27, 1926.

RAILWAY TRANSPORT : Conventions (Berne, Oct. 23, 1924). (1) Goods traffic ; (2) Transport of passengers and luggage.

Ratifications : Austria, Oct. 18, 1927 ; Denmark, March 5, 1927 ; Finland Oct. 18, 1927 ; Hungary, Oct. 18, 1927 ; Latvia, Oct. 18, 1927 ; Luxembourg, Oct. 18, 1927 ; Norway, Oct. 18, 1927 ; Netherlands, Oct. 18, 1927 ; Portugal, Oct. 27, 1927 ; Sweden, Oct. 18, 1927 ; Switzerland, Oct. 18, 1927.

Accessions : Danzig ; Poland, Jan. 26, 1927.

REFUGEES : Bulgarian—Protocol concerning the settlement of Refugees in Bulgaria (Geneva, Sept. 8, 1926).

Ratification : Bulgaria, Nov. 23, 1926.

— Greek—Protocol for the stabilization of the currency and liquidating the budget arrears of the Hellenic State, and for further settlement of Greek Refugees (Geneva, Sept. 15, 1927).

Signature : Greece.

RELIEF : Convention and Statute establishing an International Relief Union (Geneva, July 12, 1927).

Signatures : Belgium, Bulgaria, Colombia, Cuba, Danzig, Ecuador, France, Germany, Guatemala, Italy, Monaco, Poland, Rumania, Spain, Uruguay.

ROAD TRAFFIC : Convention relating to the international circulation of—(Paris, April 24, 1926).

Ratifications : Belgium, June 22, 1927 ; Egypt, June 2, 1927 ; France, June 15, 1927 ; Great Britain, May 17, 1927 ; Norway, June 15, 1927 ; Spain, Oct. 14, 1926 ; Tunis, July 28, 1927 ; U.S.S.R., Sept. 14, 1927.

Accession : Sweden, July 12, 1927.

SANITARY CONVENTION : Revised convention (Paris, Jan. 17, 1912).

Accession : Congo and Ruanda-Urundi.

— Revised Convention (Paris, June 21, 1926).

Accession : Danzig.

SLAVERY : Convention for the suppression of Slavery (Geneva, Sept. 26, 1926).

Signatures : France, Dec. 11, 1926 ; Italy, March 9, 1927 ; Latvia, Sept. 25, 1926 ; Liberia, March 31, 1927 ; Poland, March 8, 1927 ; Spain (with colonies, except Morocco), March 31, 1927 ; South Africa, Dec. 31, 1926 ; Sweden, March 28, 1927.

Ratifications : Austria, August 19, 1927 ; Bulgaria, March 9, 1927 ; Denmark, May 17, 1927 ; Finland, Sept. 29, 1927 ; Great Britain, India and Dominions (except Canada and Irish Free State), June 18, 1927 ; Latvia, July 9, 1927 ; Norway, Sept. 10, 1927 ; Portugal, Oct. 4, 1927 ; Spain, Sept. 12, 1927 ; Sweden, Dec. 17, 1927.

Accessions : Haiti, Sept. 3, 1927 ; Hungary, April 16, 1927 ; Nicaragua, Oct. 3, 1927 ; Sudan, Sept. 15, 1927.

SPITZBERGEN : Treaty (Paris, Feb. 9, 1920).

Accessions : Argentine, August 31, 1926 ; Hungary, Sept. 4, 1927 ; Portugal, Oct. 24, 1927.

TRAFFIC IN WOMEN AND CHILDREN : Convention (Paris, May 4, 1910).

Ratification : China.

Accession : Sierra Leone, Sept. 27, 1927.

— Convention (Geneva, Sept. 30, 1921).

Accession : Sierra Leone, Nov. 16, 1927.

VENEREAL DISEASES : Facilities to seamen for treatment of—Convention (Brussels, Dec. 1, 1924).

Accessions : Bahamas, Oct. 28, 1927 ; Belgian Congo ; Gambia, Oct. 28, 1927 ; Gilbert and Ellice Islands, Oct. 28, 1927 ; Granada, Oct. 28, 1927 ; Great Britain (for certain colonies) ; Jamaica, Oct. 28, 1927 ; Solomon Islands, Oct. 28, 1927.

WEIGHTS AND MEASURES : Revised Convention (Paris, Oct. 6, 1921).

Ratifications : Austria, Dec. 15, 1926 ; Mexico, April 15, 1927 ; Spain, Dec. 31, 1926.

WINE : Convention for the creation at Paris of an international institute of—(Paris, Nov. 29, 1924).

Ratifications : France, June 21, 1927 ; Portugal, July 29, 1927 ; Spain, Dec. 31, 1926.

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